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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 1043

CECIL H. BENNETT,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner Cecil H. Bennett prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on March 30, 1964.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit, is not reported and is printed in Appendix "A" hereto (pp. 41-66). The opinion of the District Court is not reported and is printed in Appendix "B" hereto (pp. 67-82).

JURISDICTION.

The judgment of the Court of Appeals was entered on March 30, 1964 (Appendix "A", p. 41). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED.

1. Whether a common purpose and participation in a single over-all conspiracy to embezzle in violation of the Landrum-Griffin Act from three labor organizations by multiple schemes may be ascribed to a union's secretary-treasurer (involved in a single fraudulent scheme against his own union), where he has no knowledge of the existence of such other schemes and none may be inferred; and if not, whether petitioner has been prejudiced thereby.

2. Whether a conviction for a single conspiracy and sentence of two years' imprisonment can be permitted to stand where under the court's charge and the record "there is no way of determining precisely . . . whether or not the jury in fact found a single conspiracy."

3. Whether counsel for a testifying defendant in a criminal prosecution has the right to comment in his argument to the jury upon the fact of his client's testimony denying guilt and the failure of his co-defendants to testify, and to draw inferences therefrom favorable to his client and unfavorable to the co-defendants.

4. Whether the notes of F. B. I. agents taken contemporaneously with their interview of a witness, recording in long hand as accurate as possible the answers of the witness, but not containing every word of the witness, is a "substantially verbatim" record whose production is required under Title 18, U. S. C., Section 3500 (e) (2), where such notes were subsequently used by the agents to formulate a smooth report which was examined

and approved by the witness and tendered to defense counsel at the trial pursuant to Section 3500.

5. Whether in a criminal prosecution the trial court has the **discretion** to deny the defense the right to call as a witness one of the three government prosecutors, who possesses information vital to the impeachment of the government's informer and chief witness, where the information is not available from any other source.

STATUTES INVOLVED.

Title 29, U. S. C., Section 501 (c) and the Jencks Act, 18 U. S. C., Section 3500, are printed as Appendix "C" to this petition (pp. 83-85).

STATEMENT.

The indictment here was in sixteen counts, involving as defendants Roy Lee Williams, Karl L. Rogers, Earl Dean Williams, Floyd Rairdon Hayes, Robert Leroy Williams, Cecil H. Bennett, and Stanley Burk Clevenger. There were also named as co-conspirators but not defendants some fifteen others; namely, Harold A. Priest, Reuben J. Levine, Norbert S. O'Neill, Wilson Armour, William M. Hampton, Clifford F. Hecht, John M. Stous, Dudley C. Talley, George Howse Temple, James T. Malkansky, Max Okun, Mojac Missouri Company, Hoffman Buick Company, Greenlease-O'Neill, Inc., and La Louisiane, Inc. Count One charged that all seven defendants, including petitioner, together with their unindicted co-conspirators conspired to violate subsection (c) of Section 501, Title 29, U. S. Code, by embezzling and stealing monies and other property of a certain three labor organizations—Local 41, Local 541, and Joint Council 56—all affiliated with the International Brotherhood of Teamsters. The remaining fifteen counts charged substantive violations of subsection ( ) of Section 501, by the actual stealing

and embezzling of money or property from each of the named labor organizations.

Roy Lee Williams, Karl L. Rogers, and Earl Dean Williams were acquitted of the conspiracy charge and all substantive counts in which they were named. Robert Leroy Williams, who became the government's chief witness, pleaded guilty to all counts in which he was charged. Floyd Rairdon Hayes was convicted on the conspiracy count and twelve substantive counts; Stanley Burke Clevenger was convicted on the conspiracy count and two substantive counts; petitioner Cecil Bennett was convicted upon the conspiracy count and one substantive count, and was acquitted on seven substantive counts.

Local 41, Local 541, and Joint Council 56 maintained their offices in the same building at 116 West Linwood Blvd., Kansas City, Missouri (R. 64). The officers of Local 41 during the period covered by the indictment, were: President, Roy Williams (an acquitted defendant below); Secretary-Treasurer, petitioner Cecil Bennett; Vice-President, Lawrence Kappelman (R. 62). Floyd Hayes had been the Secretary-Treasurer of that Local for a long period of time, up until some time in 1960 when he was succeeded by Cecil Bennett (R. 62). The President of Local 541 was Karl Rogers (an acquitted defendant below), but none of the other officers in that union were involved as defendants or co-conspirators in the case (R. 63). Joint Council 56 was a coordinating body for the various local unions in the Kansas City area, and its President was also Roy Williams (R. 66), while its Secretary-Treasurer had formerly been Floyd Hayes (R. 65). Clevenger was an assistant business agent for Local 41 (R. 69); Robert Leroy Williams (the defendant who testified for the government) had been an employee of Locals 41 and 541 since 1954, and was in charge of the referral hall at the union building (R. 61).

Within a six-month period beginning in 1954 charge accounts had been opened by the three named labor organizations at La Louisiane Restaurant in Kansas City, Missouri for use by their respective officers and agents who would sign the charge tickets later paid by the particular labor organization (R. 343, 346). Sometime in 1955 Hayes agreed with Reuben Levine, the owner of the restaurant, that Local 41's bill be increased by $240.00 per month, of which $200 was to be kicked back to Hayes and $40 to be kept by Levine (R. 34[illegible]). In a matter of six months this arrangement had been extended to the accounts of Joint Council 56 and Local 541 (R. 351). Hayes picked up the padded amounts until he left for the penitentiary in August, 1949, when Robert Williams took up the collecting (R. 355). According to Robert Williams, others who were parties to the La Louisiane agreement and shared in the kickbacks were Karl Rogers, Roy Williams and Robert Williams himself (R. 95, 98). Neither Bennett, Clevenger nor Earl Dean Williams knew anything about the La Louisiane scheme (R. 225, 228, 229, 237). No evidence was introduced showing any knowledge of the La Louisiane arrangement by any of the other co-conspirators named in the indictment and not named as defendants.

The same type of arrangements was made with Harold's D-X Service Station where the three labor organizations had opened charge accounts sometime in 1954 or 1955 (R. 498). The first agreement to defraud was made in the first part of 1955 between Hayes and Borello, the then owner of the service station, and was confined solely to Local 41 (R. 504). A short while after their first conversation about Local 41, Hayes set up the same procedure with Borello as to Joint Council 56 (R. 507). Approximately six months later, still in 1955, Hayes and Borello applied the same pad arrangement to Local 541 (R. 510). Borello kicked back to Hayes until he sold the station to

his associate Harold Priest on June 30, 1957 (R. 513-514). Priest continued the kickbacks to Hayes until Hayes left for the penitentiary in the fall of 1959 (R. 537) when Robert Williams commenced picking up the kickbacks (R. 542). According to Robert Williams others who were parties to the over-all scheme at Harold's D-X were Roy Williams, Karl Rogers and Robert Williams himself (R. 95, 99). Neither Bennett, Clevenger, nor Earl Dean Williams knew anything about the service station kickback (R. 225, 228, 229, 237). No evidence was introduced showing any knowledge of this arrangement by any of the other conspirators named in the indictment.

The Hoffman Buick agreement took place in conversations between Hayes and Dudley Talley, Hoffman's shop foreman and an unindicted conspirator, in 1956 and 1957. The substance of the agreement was that some other equipment at Local 41 would be brought in for repairs, and the union officials would instruct Hoffman personnel as to what official union cars the repairs should be charged (R. 610). Such repair orders describing different cars than those actually repaired were written on instructions of Hayes, Bennett and Clevenger and billed to Local 41. Charges totaling several hundred dollars were also billed to and paid by Joint Council 56 (R. 611-638) but no charges were ever billed to Local 541. Other Hoffman Buick employees involved as unindicted conspirators were James Malkausky and George Temple. No Hoffman Buick employee testified as to any involvement of Roy Williams, Earl Dean Williams, or Karl Rogers in the fraudulent billing scheme, and no other alleged co-conspirators, such as Harold Priest, Reuben Levine, Max Okun, etc., were shown to have had knowledge of such a fraudulent scheme as existed at Hoffman Buick.

The Greenlease-O'Neill, Inc., agreement was one to defraud Local 41 and Joint Council 56; it evolved out of

a conversation in 1957 between Hayes and Wilson Armour, the Greenlease service manager (R. 788). Armour's instructions were to write the repair order for another car than the one repaired (R. 789). In 1959 Hayes and Norbert S. O'Neill of Greenlease-O'Neill, Inc., worked out a scheme whereby Greenlease-O'Neill billed and titled a jeep to Earl Dean Williams and fraudulently billed the balance of certain payments to Joint Council 56 on its monthly service account (R. 779). William Hampton, another Greenlease-O'Neill service salesman, had also written false repair orders for Hayes, Robert Williams and Clevenger pursuant to a conversation with Hayes in late 1957 or 1958 (R. 812-813). The accounts fraudulently billed by Greenlease-O'Neill were to Local 41 and Joint Council 56 (R. 815-824). Clifford Hecht, assistant service manager, prepared a fraudulent billing of the balance of the jeep's purchase price to Joint Council 56 (R. 842-846). There were no business dealings between Greenlease-O'Neill and Harold's D-X Service Station or Reuben Levine or La Louisiane, nor were any of the other named co-conspirators such as Talley, Temple, Malkausky, etc., shown to have any connection with the Greenlease-O'Neill scheme. There were no billings to Local 541.

The Gallup Stationery fraud arose out of the purchase of office and lounge furniture which was paid for by Local 41 (R. 898, 899). On February 23, 1961 Roy Williams and Floyd Hayes were in Gallup's store and Williams ordered certain office furniture which was delivered to the union building (R. 912). In March, 1961, Hayes came in alone and bought lounge furniture and five chairs for his recreation room (R. 913) all of which was paid for by Local 41. No other co-conspirators were implicated in these transactions.

The fraudulent charges at Paul Greenlease Cadillac were to Local 41 and Joint Council 56 (R. 926-930). Robert

Williams on September 29, 1959 brought in to the Paul Greenlease service salesman, Orville Moyer, a 1958 Cadillac which Williams stated belonged to Mrs. Hayes, but had the repairs billed to Joint Council 56 (R. 931). A 1957 Cadillac convertible belonging to Roy Williams was repaired at the expense of Local 41 (R. 928-929). No other co-conspirators were shown to have any knowledge of the fraud at Paul Greenlease Cadillac.

The Missouri Mojac fraud arose first in connection with work done at Hayes' home in the latter part of 1959 (R. 945). Okun's original conversation with Hayes was with regard to building an open porch behind the house, connected to the garage (R. 945); it took place just prior to August 5, 1959. Hayes gave Okun a Local 41 check to cover the original estimate (R. 946, Exhibit N-1). Subsequently, the job was expanded at Mrs. Hayes' direction, to converting the porch into a closed weatherproof room (R. 949). Later Okun received payment from Local 41 for the balance due on this job begun in the fall of 1959 (R. 959). On another occasion Missouri Mojac did some additional work at Hayes' home in early 1961, lasting a few weeks (R. 967); about this same time Okun was completing a major improvement job for Local 41 at the Union building (R. 966). Missouri Mojac received payment for the 1961 work done at Hayes' home by adding it to the contract price for Local 41's work (R. 971). All the work done by Okun at Hayes' home was paid by Local 41; none of it was billed or paid for by Local 541 or Joint Council 56 (R. 1006). Neither Karl Rogers, nor any of the other named co-conspirators such as Bennett, Clevenger, Priest, Levine, etc., were shown to have had knowledge of this fraudulent scheme to have Local 41 pay for repairs and renovations to Hayes' home.

In summary, petitioner Bennett, except for the ministerial act of co-signing check as an officer of Local 41, was

not involved in any fraudulent scheme other than the one at Hoffman Buick. Neither did he receive any of the converted funds, nor have any knowledge of the frauds at La Louisiane, Harold's D-X, Greenlease-O'Neill, Paul Greenlease Cadillac, Gallup Stationery and Missouri Mojac. "As for [petitioner] Bennett, Williams testified that, so far as he knew, Bennett was not involved in the corrupt accounts of the La Louisiane Restaurant and Harold's D-X Service Station (R. 229-230). In fact, the only item of testimony he gave relating to Bennett, i. e., Bennett's picking up the final kick-back from Harold's D-X and returning same, was not, in itself, incriminating (R. 139-40). It was corroborated by Harold Priest and admitted by Bennett himself (R. 1545-46). Bennett was acquitted on the substantive counts involving the La Louisiane and Harold's D-X frauds. He was convicted only on the substantive count involving fraudulent repair bills at Hoffman[n] Buick Company, and on the conspiracy count. It is obvious from the pattern of the verdict, therefore, that his conviction rested upon the testimony of Dudley Talley and other employees at Hoffman Buick Company." **Brief for the United States**, p. 33.

On cross-examination, the government's chief witness Robert Williams was questioned extensively concerning his various conversations with government agents at the time he decided to become a government witness. He was interviewed by F. B. I. agents in Topeka, Kansas, on June 23 and June 24, 1962 (R. 266)—after this prosecution had been instituted. The witness then testified that some time **after** these interviews with the F. B. I. agents, he met with Mr. Featherstone, counsel for the government, and with regard to what he expected to gain from his testimony, he testified as follows (R. 273-274):

"Q. Didn't you ask him what this cooperation was going to get you?

A. I wasn't in any bargaining position.

Q. Well, did you ask Mr. Featherstone in any language that you want to use words to the effect, 'What am I going to get for cooperating to the government?'

A. At the subsequent meeting naturally I was concerned about what was going to happen to me. Mr. Featherstone told me they could ask the court—they couldn't make any promises; they could ask. Make recommendations I believe was the word.

Q. In other words, he told you in words to this effect, 'I am not the judge and I can't tell you what sentence you are going to get, but I can certainly make a recommendation to the judge if you tell your story that you get favorable treatment,' isn't that about what he said?

A. No. He used the word recommendations.

Q. Recommendations. He would recommend to the judge you get leniency? Right?

A. I couldn't say what he meant to recommend. All I can say is that he used the word recommendations.

Q. What did you take this to mean?

A. I took it to mean he would tell the court that I had fully cooperated and told the story as it was, and that was it.

Q. And you expected leniency from the court, isn't that it?

A. I couldn't tell what I expected. My expectations—I can't——"

Subsequently the government and the defense entered into a stipulation that the witness, Robert Williams, saw and met Mr. Featherstone for the first time on June 17, 1962 (R. 297), which was contradictory of Robert Williams' testimony on this matter.

Prior to the cross-examination of government witness Robert Williams, the petitioner called as a witness Orson Myers, Jr., an FBI agent, in order to ascertain whether or not the government had fully complied with its obligations under 18 U. S. C., Section 3500. Mr. Myers testified that he interviewed witness Robert Williams a total of five times (R. 174), and that he actively participated in the interview processes (R. 174). The agent further testified that during the interview he and another agent would ask questions, Williams would answer them, and the agents would then discuss the circumstances involved in the answers, and write down such answers, each agent writing a portion thereof (R. 175). The agent further testified that he made notes on all of the answers given by Williams, and dictated the results very shortly thereafter from said notes, and that those notes were sufficiently complete so that "I can make an accurate transcription" (R. 175). The interviews with Williams on June 23 and 24, 1962, were converted into a final report form on June 25, 1962, and typed by a stenographer on June 26, 1962 (R. 176). Within a week or ten days, and possibly as long as 30 days thereafter, the agent destroyed the notes from which he dictated his report (R. 178); this took place at least four months after the instant indictment had been returned when prosecution was already an accomplished fact. The agent indicated that he was familiar with the **Jencks** decision by the Supreme Court, and was also familiar with Section 3500, Title 18, of the U. S. Code (R. 178). It had been Agent Myers' practice to retain notes after transcription of interviews only when precise data was recorded (R. 178). The Agent's original notes were not read or approved by Williams, only the reports as they now stand in final form (R. 181). Agent Myers further testified that while some of the words in his notes may have been abbreviated (R. 188), he had attempted to take down as accurately as

he could the answers which he got from Williams, which answers were in the notes he had destroyed (R. 189). His final dictated report was based upon his notes as supplemented by his own memory (R. 188).

With regard to these notes, petitioner below then made the following motion (R. 183):

> "Mr. Wadden: Of course, your Honor, we take the position that they are covered by E-2, and that the government's failure to produce them gives us the right to move to strike the entire testimony of the witness, Robert L. Williams, and on behalf of my client, in view of the government's failure to produce the original longhand notes to the agent, I now move that his entire testimony be struck.
>
> The Court: Very well. Let the record so show, that the motion is made and overruled."

During the defendants' case below, counsel for the defense attempted to call as a witness Mr. James Featherstone, the special assistant attorney general who was one of three government counsel participating in the prosecution of the case (R. 1487). A considerable discussion took place between counsel and the court, out of the hearing of the jury, the pertinent portion of which is as follows (R. 1487-1497):

> "The Court: . . . . What is the purpose of it?
>
> Mr. Wadden: The purpose, Your Honor, is I want to ask Jim a few questions about the first time he met Bob Williams, about the conversation that took place between them, having to do with motive of Mr. Bob Williams. Also the record is in conflict. Mr. Williams' testimony is he had given a complete statement to the Federal Agents before he ever met Mr. Featherstone. We have no such statements. They have not been made available, if it were true.

The Court: Also I don't quite see the direct connection between that case and your situation here. Now, what is the purpose of your testimony or calling Mr. Featherstone?

Mr. Wadden: My purpose in calling Mr. Featherstone, Your Honor, is to establish what conversation took place between Mr. Featherstone and Mr. Bob Williams which, according to Mr. Featherstone's stipulation, predated any statement he had given to the FBI. I want to know whether there was any inducement, whether there was any encouragement, whether there were any promises made to him, and certainly I am not bound by Bob Williams on that.

Mr. Featherstone: You have got the answers to these questions. You have got the answers.

Mr. Wadden: I want the answers from you, Mr. Featherstone, not from that liar.

. . . . . .

Mr. Neff: The Napue case as he just explained it doesn't even fit within this, because the witness has already testified that recommendations will be made to your Honor with regard to—he has already said that.

Mr. Wadden: Yes, and I want to hear from Mr. Featherstone what these recommendations were.

. . . . . .

Mr. Wadden: . . . Certainly I have got a right to find out what conversations took place between him and Mr. Featherstone on the 17th of June before he started giving statements to the FBI, although his testimony, Your Honor, under oath is that he had given all of the statements before he talked to Mr. Featherstone. Now, if that testimony be true that he gave, then I want the government to produce the other statements which haven't been produced.

Mr. Featherstone: I don't think any time sequence makes any difference. And further, Your Honor, he answered the question. He said recommendations to the court, but that is all.

Mr. Wadden: Well, I want to know what your recommendations were going to be.

. . . . . .

Mr. Featherstone: And further, your Honor, if any question were asked of me, I am sure the answer would have to be prejudicial to these defendants and then they would be screaming for a mistrial.

The Court: Well, I think they would have invited that if they put you on the stand.

Mr. Broaddus: Not this counsel, Your Honor.

. . . . . .

The Court: I don't think at this time that Mr. Featherstone should be called on the witness stand unless it is by agreement of all of defense counsel. Now, he has stated that his testimony probably would be prejudicial to many of the defendants. Now, if they want to invite that, that is one thing. I don't want any situation with mistrial called or the grounds for mistrial.

Mr. Wadden: Your Honor, if I may make the observation, the only way his testimony could be prejudicial to the defendants is if he didn't answer the question of what he promised Bob Williams or what the recommendations were. I am not going into anything else. So obviously it can't be prejudicial to any of the defendants, because no testimony is called upon to be elucidated concerning any of the defendants.

. . . . . .

The Court: Well, I think, first, before ruling on this out of the presence of the jury, we should have

> Mr. Featherstone's statement, sworn statement, to go into the record to see what the evidence will be and whether or not it would be essential to the presentation of your defense."

The record disclosed, however, that no sworn statement was ever provided by Mr. Featherstone. Furthermore, in a subsequent colloquy off the record, Mr. Featherstone admitted that he was advised a day ahead of time that he was going to be called as a defense witness (R. 1494-1496). The court, however, reserved its ruling (R. 1495) apparently to await the filing of the sworn statement by Mr. Featherstone, but which was never filed. On the following day, the request of the defense counsel was repeated, as follows (R. 1715):

> "Mr. Wadden: Your Honor, at this time I renew my motion for the reasons previously stated in the record with regard to calling Mr. James Featherstone to the stand. I believe Your Honor previously reserved your ruling thereon.
>
> . . . . . .
>
> The Court: The motion will be overruled."

During the conference between counsel and the court in chambers, in which the various instructions were discussed and motions raised, the court specifically ordered counsel for petitioner Bennett, among others, not to comment upon the failure of any of the other defendants to take the witness stand (R. 1784).

At this same conference, in discussing the various instructions which the court intended to include in its charge, counsel for the defense specifically requested that the separate conspiracies which are involved in this case be specifically defined to the jury (R. 1825). The court, in response, indicated that it felt that there were at least three separate but related conspiracies involved, and that there

was sufficient evidence to take the case to the jury on those points (R. 1831). The court at this time proposed that portion of the instruction which reads as follows (R. 1844):

> "If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment and that not all defendants were members of or participated in such separate conspiracies, then you may only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirators involved in that particular conspiracy."

This particular instruction was again read to counsel (R. 1855), and specifically objected to by all defendants (R. 1855, 1856).

In the actual charge given to the jury, the following paragraphs were included (R. 2036):

> "If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment in Count I and that not all of the defendants were members of or participated in such separate conspiracies, if you so find, then you may only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy."

By leave of court, all objections which had been made at the conference on instructions held in chambers the previous day were renewed (R. 2063).

A motion for judgment of acquittal was made at the close of all evidence on behalf of petitioner and was overruled by the trial court (R. 1823, 1824, 1856).

Following the verdict of guilty against petitioner, the filing of a motion for new trial, and the trial court's order overruling same, petitioner together with Robert Lee Williams (who had pleaded guilty) and the other convicted

defendants appeared before the court for sentencing. The following proceedings took place (R. 2077):

> "The Court: Does the Government care to make any statement at this time?
>
> Mr. Featherstone: Your Honor, the Government would like to make a statement in behalf of Robert Williams. The Government is appreciative of the cooperation Mr. Williams has shown. He came forward voluntarily, testified truthfully in behalf of the Government, and in view of that the Government recommends that he be granted a suspended sentence.
>
> The Court: Any further statement on behalf of the Government?
>
> Mr. Featherstone: No, Your Honor."

Thereupon, Williams was sentenced to imprisonment for three (3) years on Count I and the next substantive count, with the provision that only six (6) months of said sentence be served and Williams placed on probation as to all other counts to which he pleaded guilty (R. 2083). In sentencing petitioner Bennett, the court remarked (R. 2083):

> "The participation of Mr. Bennett in the offenses charged herein, of course, was not as great as that of some of the other defendants, and his involvement on Count 8 was not taken too seriously by the Court. His involvement in Count 1 is taken seriously by the Court, as he was an officer of the Union, as an officer he was placed as a trustee of these funds and had a greater responsibility than that of someone just hired by them."

Bennett was then sentenced to two (2) years' imprisonment on Count I, and placed on probation as to Count VIII, the only substantive Count on which he was convicted (R. 2083, 2085).

Thereafter, an appeal was taken in due course to the United States Court of Appeals of the Eighth Circuit where petitioner's judgment of conviction was affirmed on March 30, 1964 (see Appendix "A", p. 66).

REASONS FOR GRANTING THE WRIT.

1. Certiorari should be granted on the first of the questions presented because this case presents an important question affecting the reach of conspiracy prosecutions under Section 501 (c) of Title 29, U. S. C. This was the section added by the recently enacted Landrum-Griffin provisions of Title 29 which for the first time made it a federal crime to embezzle and convert the funds of a labor organization; it was aimed at such abuses of their position by labor union officials whose misdeeds seemed to have gone unprosecuted under state laws. The same Act also provided for the mandatory bonding of union officers who held positions of financial responsibility, Title 29, U. S. C., Section 502. Here is a case which would be the first expression by this Court on the criminal responsibility of a financial officer charged as a co-conspirator under Section 501 (c); it would furnish a perfect vehicle for considering whether or not his criminal liability (i. e., for one offense) should be enlarged by the otherwise innocent administration of his financial duties. Here, the only substantive charge on which petitioner was found guilty was the Hoffman Buick substantive charge involving the conversion for his benefit of several hundred dollars from one local—Local 41, but because he performed his ministerial duty of co-signing Local 41 checks for six other vendors to Local 41, he is deemed to be a member of a single conspiracy to embezzle from three labor organizations in amounts upwards of $240,000. Petitioner Bennett was a conspirator on a single (i. e., the Hoffman Buick) spoke emanating from the hub (Hayes) in a circle conspiracy. He was unaware of the existence of the other spokes or

fraudulent schemes at La Louisiane, Harold's D-X, Greenlease-O'Neill, Paul Greenlease Cadillac, Gallup Stationery and Missouri Mojac. Unless knowledge of the **existence** of other spokes dealing similarly with the hub is either actual or may be inferred from the interdependent nature of the criminal enterprise, the spokes cannot be held to have conspired with each other and to have consented to the overall plan which the hub seeks to accomplish by their joint action, see Note, 57 Columbia L. Rev. 387, 388-392, cited with approval by the Second Circuit in **United States v. Agueci**, 310 F. 2d 817.[1] Here there was nothing so interdependent about the separate frauds and each fraud was complete unto itself and not dependent on any other spoke for success; the proof is the success of the frauds at La Louisiane and Harold's D-X where the government's case-in-chief exculpated petitioner. The Hoffman Buick fraud plainly gives rise to no inference that Bennett had any knowledge that there was a larger plan embracing two other Teamster labor organizations (neither of which he was an officer) at six other vendors.

The decision of the court below is in conflict with the Ninth Circuit's cases of **Canella v. United States**,[2] 157 F. 2d

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[1] *United States v. Agueci*, 310 F. 2d 817 (1962), l. c. 827:

"The nature of the enterprise determines whether the inference of knowledge of the existence of others in one overall conspiracy is justified . . ."

[2] In *Canella v. United States*, 157 F. 2d 470 (1946), the various spokes dealt with the Canella-Campbell hub, without knowledge of each other's existence, using similar schemes and methods to defraud the United States by depriving it of Canella's actions in discharge of his duties free from corruption and fraud. Canella was a Colonel in the Army in charge of the hiring of civilian personnel and the procuring of food and supplies at the Santa Ana Army Base. He agreed with one Campbell that Campbell should find people who wanted jobs and who wanted to sell products and services to the Army, but were willing to kick back to Canella. As the result of this agreement Campbell found Miller, Jensen and Elliott who paid varying amounts from $50 to $100 to Campbell for transmittal to Canella in return for Canella's hiring them as civilian

470; **Daily v. United States**, 282 F. 2d 818 and **Rocha v. United States**, 288 F.2d 545 and with this Court's case of **Kotteakos v. United States**, 328 U. S. 750. The very nature of the typical duties of a labor union's secretary-treasurer

employees. There was no evidence that Miller, Jensen or Elliott knew of the other's transactions with Campbell and Canella, or any of the other frauds practiced by Campbell and Canella. In addition, Campbell arranged a kickback with Wyckoff and McCormac of 2% of each month's gross business for awarding their company (Excelsior) the dairy contract at the Base. This money was kicked back to Canella through Campbell. Wyckoff was Excelsior's plant superintendent who on occasion sent Campbell to cashier McCormac to collect the bribe when Wyckoff himself or one Ranney did not hand it over. There was no evidence connecting Wyckoff and McCormac with Miller, Jensen or Elliott, and no evidence that Wyckoff or McCormac knew of Campbell's and Canella's transactions with Miller, Jensen or Elliott. Also, one Ahmann agreed to pay $100 to Canella after requesting assistance from Campbell in seeing what could be done to get Ahmann assigned to the Santa Ana Base. No payment was made when Ahmann failed to pass his physical examination. There was no evidence connecting Ahmann with, or indicating that Ahmann knew of, Miller, Jensen, Elliott or Wyckoff or McCormac. The Government, realizing that there was no evidence of the various spokes' actual knowledge of the existence of each other, attempted to argue that such knowledge was inferrable from the inter-dependent nature of the criminal enterprise and thus their individual purposes to conspire to defraud the United States would become one common purpose and not separate and similar purposes; it argued on brief to the Ninth Circuit that "each one who dealt illegally with Canella through Campbell undoubtedly knew that Canella was not limiting his unlawful activities to their particular job or enterprise; that if he would take money for their employment he would take it from the next applicant as well," *Id.*, 157 F. 2d, l. c. 477. In rejecting this argument, the Court significantly tested the alleged singleness of the conspiracy by viewing the record from the standpoint of the individual spokes in order to determine whether there was truly a single scheme and common purpose. It may well have been that from Canella's and Campbell's place at the hub they had one general scheme to henceforth use Canella's office as a United States army officer to line their pockets and that the "separate adventures" with Miller, Jensen, Elliott, Ahmann, *et al.*, were the various facets of accomplishing the scheme, but, taking each spoke in turn, the Court could find no such common purpose shared in by him or consent to such scheme, l. c. 157, F. 2d 477:

> "Here there was no purpose common to Wyckoff or McCormac and Miller, nor to Wyckoff or McCormac and Elliott, or any of the others whose acts formed separate spokes

and of the broad rules of evidence permitted in conspiracy prosecutions renders Section 501 (c) an open invitation "to broaden the already pervasive and wide-sweeping net of conspiracy prosecutions" (**Grunewald v. United States**, 353 U. S. 391, 404). Any attempt to apply a less stringent test of guilt to a union-connected-spoke (the secretary-treasurer) in a circle conspiracy than to a non-union-connected spoke (the vendor) should be viewed with disfavor by this Court where as here at least one vendor was admitted by government counsel not to have been "aware" of the scope of this conspiracy, no, sir" (Transcript of Oral Argument, p. 44). At the very least, if the dragnet of the single over-all conspiracy can be so broadened as to include within it the existence of spoke-frauds beyond the union officer's own and beyond his knowledge (actual or inferred), labor unions should be warned for their own protection that the Landrum-Griffin bonding requirements of Title 29, Section 502 have been rendered inadequate to satisfy the legislative purpose.

As an alternative to its holding that the instant record presented a submissible case for one overall conspiracy, the Eighth Circuit found that, even if separate conspiracies are in fact here involved, this case is governed by **Berger v. United States**, 295 U. S. 78, rather than by **Kotteakos**. This holding is a typical alternative holding in

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in this rimless wheel; nor was there any evidence connecting McCormac and Wyckoff with other conspirators."

On this record the Ninth Circuit found five separate conspiracies:

(1) Canella, Campbell and Miller;
(2) Canella, Campbell and Jensen;
(3) Canella, Campbell and Elliott;
(4) Canella, Campbell and Ahmann;
(5) Canella, Campbell, McCormac, Wyckoff and Ranney.

Canella and Campbell were the hub, and each other schemer constituted the separate spokes, but none of the spokes had knowledge (either actual or inferrable) of the existence of other spokes to the conspiracy, therefore, they could have had no common purpose in a single enterprise.

almost every case where a conviction is affirmed against the charge that the multiple-conspiracy doctrine of **Kotteakos** requires reversal and brings into sharp focus the problem of the inter-relationship and proper juxtaposition between **Berger** and **Kotteakos**, see 57 Columbia Law Review 387. Whether a case comes closer to **Berger** or to **Kotteakos** is another problem which has defied definition by the Courts of Appeal since the two cases were left standing more or less side by side as the result of **Kotteakos** in 1946. On the one hand, **Berger** involved two conspiracies and four conspirators, where **Kotteakos** considered thirty-six co-conspirators in eight conspiracies. Since **Kotteakos** the two-conspiracy cases have uniformly affirmed convictions as coming within **Berger** (see **Grissette v. United States**, 5 Cir., 313 F. 2d 187; **United States v. Agueci**, 2 Cir., 310 F. 2d 817; **Harlow v. United States**, 5 Cir., 301 F. 2d 361; **United States v. Santore**, 2 Cir., 290 F. 2d 51; **Hanis v. United States**, 8 Cir., 246 F. 2d 781; cited Appendix "A", p. 54-55), but the three-and-more conspiracy cases have resulted in reversals of convictions on the basis of **Kotteakos**, see **Daily**, *supra*, three conspiracies and twenty co-conspirators; **Canella**, *supra*, five conspiracies and twelve co-conspirators; and **Brooks v. United States**, 164 F. 2d 142, "several" conspiracies and fourteen co-conspirators. Here we have a situation involving 22 co-conspirators where the trial court stated before submitting the case to the jury that he saw at least three conspiracies on the record before him[1] (R. 1841). This

[1] The three overall conspiracies found by the trial court were (1) the restaurant and service station "pad" and "kick-back" arrangements as set forth in Counts II through VII; (2) the improper charging of automobile repairs as set forth in Counts VIII through XIII; and (3) the home-improvement program (including furniture) for the Hayes home under Counts XIV through XVI. Even these three groupings may well consist of separate smaller conspiracies, since different unions were victimized and different co-conspirators (whose existence was unknown to each other) were involved in many of the counts. But certainly, by the most conservative computation, at least the three separate conspiracies found by the trial court were indicated by the evidence.

alone would suffice to exclude the **Berger** doctrine, for as Justice Rutledge noted in **Kotteakos**, "The sheer difference in numbers, both of defendants and conspiracies proven, distinguishes the situation", 328 U. S. at p. 766. The Eighth Circuit opinion has thus thrown the whole problem into greater turmoil by revitalizing **Berger**, traditionally applied only to two-conspiracy cases in the post-**Kotteakos** period, and holding it to be applicable to a three-conspiracy, twenty-two co-conspirator situation. While the **Berger** case has generally been considered as having been limited to its facts by **Kotteakos** (so that the Courts of Appeal have adhered to the latter when three or more conspiracies were involved), the instant decision has injected great doubt as to the respective roles of these two landmark decisions. For here we have a conspiracy case whose numbers bring it close to **Kotteakos**, but which has been held subject to the harmless error doctrine of **Berger**. If the "sheer difference in numbers" is a sufficient distinction, i. e., if the **Kotteakos** opinion really means what it says, the Eighth Circuit opinion raises doubt and conflict which should be reviewed by this Court.

It is further interesting to note that virtually every circumstance in the **Kotteakos** case, which contributed to the ultimate decision there that prejudicial error was injected by joining multiple conspiracies in a single charge, is present in the instant record: repeated charges to the jury containing references to "**the** conspiracy"; impossibility of keeping the separate conspiracies separated, particularly in regard to use of admissions and evidence as to certain defendants only; obvious inability of the jury to keep the conspiracies separate, particularly in the absence of an instruction differentiating the conspiracies. It is not conceivable that these circumstances instilled prejudice in the **Kotteakos** case but not in the instant trial. This, of course, further accentuates the con-

flict created when the Eighth Circuit chose to apply the **Berger** harmless error rule to the present record.

The instant case illustrates the need for this Court to speak out again on the problem of the single conspiracy. Eighteen years under **Kotteakos** have now gone by with results and decisions in lower courts that are far from harmonious and raise questions about the uniformity of the application of criminal justice in the various circuits. Commentators have noted diverse and conflicting rulings and tendencies in the post-**Kotteakos** federal law of criminal conspiracy (see 57 Columbia Law Review 387; 72 Harvard Law Review 920). Whether **Berger's** present vitality is being given too narrow or too broad a reading and whether membership in the single overall criminal conspiracy is being unduly expanded or unduly restricted by the various Courts' of Appeals insistence or lack of insistence on the requirement of a spoke's knowledge of the **existence** of other spokes merit this Court's consideration.

2. The second question stated raises an important question pertaining to the proper charging of juries in conspiracy cases. Here, the trial court (convinced that at least three separate conspiracies had been shown (R. 1841) and not wishing to grant a mistrial after four weeks) sought to avoid the pitfalls of **Kotteakos** by instructing the jury that if they find separate conspiracies relating to the acts alleged in the single conspiracy count, the acts and declarations of a co-conspirator in any particular conspiracy are evidence only against the members of that particular conspiracy. This is tantamount to telling the jury that the separate defendants could be convicted as members of separate conspiracies. It gave the jury a roving commission to convict for one or more separate conspiracies not separately alleged in the indictment contrary to Section 557 of the Criminal Code calling for the separate statement of distinct offenses. The Eighth

Circuit's approval of this instruction is contrary to the Fifth Circuit's holding in **Brooks v. United States**, 164 F. 2d 142, 143, that legal harm is done a defendant by convicting him upon proof that he was engaged with others of the defendants in a separate conspiracy of the general nature of the conspiracy charged and that condemns the practice of leaving it to the jury to pick and choose between conspiracies. As matters now stand, there is no way of telling on the instant record that petitioner was convicted of the same conspiracy as Clevenger. It is possible that Bennett was convicted on the Hoffman Buick spoke and Clevenger on Greenlease-O'Neill. It is equally possible that both petitioner and Clevenger were convicted for their activities at Hoffman Buick, but, assuming the jury found separate conspiracies, this was a separate conspiracy from the single overall conspiracy charged. No one can ever know of what particular offense all twelve jurors found petitioner guilty with Clevenger and Hayes and returned the unanimous verdict required by law—whether the single conspiracy or one of the separate conspiracies permitted to be found within the single conspiracy. The present instruction is erroneous, for once having itself introduced the concept of separate conspiracies into the case, it fails to define them or tell the jury that they cannot be the predicate for returning guilty verdicts under the single conspiracy alleged, or tell the jury what to do with the separate conspiracies and individual defendants after it has found separate conspiracies. After an entire trial has proceeded for weeks on the single conspiracy theory, the mention for the first time on the last day of the trial of the possibility of separate conspiracies does not serve to keep distinct conspiracies separated and could not erase from the jurors' minds the possibility of transference of guilt from one defendant to another, see dissenting opinion by Judge Frank at 137 F. 2d 1062, 1063, specifically ap-

proved in **Kotteakos**, 328 U. S., l. c. 770, fn. 26. The conflict of this case with this Court's **Kotteakos** opinion and **Brooks** is heightened, moreover, by the Eighth Circuit's finding that "there is no way of determining precisely upon this record whether or not the jury in fact found a single conspiracy," Appendix "A", p. 52, Petitioner is left in the position of having been sentenced to two years' imprisonment for an offense (taken seriously by the sentencing court (R. 2083), for which he may or may not have been found guilty. In view of the trial court's remarks at sentencing (R. 2083) it is quixotical to say that he was not prejudiced because no one can determine precisely whether he was convicted of participation in a single overall conspiracy where three labor organizations were cheated of $240,000 or in a single and separate conspiracy where one labor organization was cheated of amounts totalling two thousand and some dollars. Here the prejudice was even greater than in **Kotteakos** because this jury was given a choice not only as to the number of conspiracies (none, one, or more than one) but also as to combinations of guilty defendants (all, some, or none). However, much variety may be the spice of life, it is not, under our jury system, the touchstone of a fair and even administration of criminal justice in conspiracy prosecutions.

3. The Eighth Circuit's approval of the trial court's order to petitioner's trial counsel not to comment in his argument to the jury upon the failure of co-defendants to testify raises an important question relating to the scope of the privilege against self-incrimination; the issue has been characterized in the opinion below as "substantial and troublesome" (Appendix "A", p. 63) and raises procedural difficulties crucial to the prosecution of co-defendants in conspiracy indictments. In addition, the rationale of the instant case is contrary to the Fifth Cir-

cuit's in **DeLuna v. United States**, 308 F. 2d 140, rehearing denied 324 F. 2d 375, and attempts to preserve a harmony with **DeLuna** by reliance on an unwarranted factual distinction.

Here, the Eighth Circuit sought to distinguish **DeLuna** because petitioner did not pin any criminal acts upon his non-testifying co-defendants, yet a careful reading of all the opinions in **DeLuna** (including the one on rehearing after some 13 months' deliberation) evidences no such limitation on the doctrine of that case; rather it directed itself to and approved the right of the testifying defendant's counsel to draw any inferences available from the silence of a co-defendant to show that guilt lay somewhere other than with his client. Thus, here, petitioner's counsel was prevented from making the argument that Bennett had been the innocent pawn of his co-defendants and knew nothing of any overall conspiracy and that, if there were schemes to embezzle, the jury should consider in fixing guilt who had denied participation and who had not, who had opened himself to cross-examination and who had not, who stood undeniably as the receivers of kickbacks and who did not. The prejudice overlooked by the Eighth Circuit is that in argument Bennett's counsel could then (after having heard all the evidence for the first time) have castigated Hayes and Clevenger for their undenied guilt and their involvement of innocent men like Bennett. It is not difficult to perceive that such an argument might have benefitted petitioner who was acquitted of seven of the nine charges against him.

More important, however, to the orderly administration of criminal justice than either the correctness of the instant decision or its conflict with **DeLuna** are the serious procedural difficulties inherent in both decisions. They are well set out in Judge Bell's concurring opinion 308 F. 2d 140, 155, and the *per curiam* on rehearing where

none of the judges indicated that severance under **DeLuna** would be based upon the additional representation that the testifying defendant intended by his testimony to "pin" things on the non-testifying defendants. The procedural difficulties openly predicted and stated in **DeLuna** are now realities; in its petition for rehearing in **DeLuna** the government stated that the case "already had a significant effect on joint trials in the Western District of Texas in that joint trials have been and are now automatically severed and not permitted within the San Antonio, Austin and Waco Divisions" (Petition for Rehearing, p. 2). Recently on February 3, 1964 in the United States District Court for the Western District of Pennsylvania, District Judge Foley in **United States v. Grosso** (Criminal Action 62-281) granted a pre-trial motion for severance on the authority **DeLuna** where (without alleging any intent to pin criminality on non-testifying defendants) an affidavit of counsel alleged that the testifying defendant intended to call attention to his willingness to take the stand and to contrast this with the failure of the other defendants so to do, and to draw inferences from this circumstance favorable to the testifying defendant and unfavorable to the others.

The effect of the decision in this case is to render the procedural problems in multiple-defendant conspiracy cases even more difficult. Can a defendant now promote a mistrial by pinning things on his non-testifying co-defendant and then insisting on his right to comment? Must sufficient criminality to support the right of comment be pinned on the non-testifying defendant through the proferred testimony of his co-defendant on direct examination, or is a reluctant cross-examination enough, or cannot the rational inferences of counsel during argument suffice? If a defendant moves for severance before trial on the basis of **DeLuna** and the instant case, must he affirm that

he does not intend to testify and that his co-defendant intends to pin things on him? Can we be sure that co-defendants will know in advance whether another co-defendant will testify and what will be the nature of his testimony? If we say that the right to a mistrial must await an evaluation of the testifying defendant's testimony (i.e., to see whether he pinned things on his co-defendants), then are we not committing the government to mistrials and retrials after having invested in the presentation of its entire case? If a defendant does affirm in good faith that he intends not to testify, does he waive his right to testify if trial strategy dictates a change? These and many other questions readily suggest themselves to demonstrate that a Pandora's box of error and procedural difficulties has been opened with respect to the prosecution of multiple-defendant conspiracy prosecutions; if the crime of conspiracy is to continue to be the prosecutor's darling, this Court's general supervisory power is needed to resolve the problems and to prevent needless and expensive retrials on reversals arising out of the three-headed conflicting interests necessarily to be judged here under the privilege against self-incrimination, i. e., the testifying defendant, the non-testifying defendant, the prosecution. (See the trial court's opinion, Appendix "B", p. 81, where it did not consider itself bound to follow **DeLuna** because the majority opinion is not a "correct statement of the law as it is or as it should be.")

4. The fourth of the questions presented here involves the proper definition of "substantially verbatim" as used in 18 U. S. C., Section 3500 (e) (2); this was raised but not resolved in **Campbell v. United States**, 373 U. S. 487 (See question No. 2 in the **Campbell** Petition for Certiorari). The question is one of widespread importance in the administration of federal criminal justice; it is poten-

tially present in every prosecution where a government witness has been interviewed prior to trial and the interviewer has made notes. In addition, as pointed out in the **Campbell** Petition for Certiorari, p. 11, the interpretation of "substantially verbatim" has given rise to conflict among the circuits, calling for resolution by this Court.

As the **Campbell** petition noted, the restrictive interpretation of "substantially verbatim" by the First Circuit in **Campbell**, 296 F. 2d 527, 532 (1st Cir.), 303 F. 2d 747, 748 (1st Cir.), conflicted with the Second Circuit interpretations in **United States v. Thomas**, 282 F. 2d 191, 194 (2d Cir.), and **United States v. McKeever**, 271 F. 2d 669, 674-75 (2d Cir.), with the Fifth Circuit interpretation in **Papworth v. United States**, 156 F. 2d 125, 129 (5th Cir.), cert. denied, 358 U. S. 854, and with the interpretation of a district court of the Third Circuit in **United States v. Waldman**, 159 F. Supp. 747, 749. It is also in conflict with Judge Murphy's opinion in **United States v. Aviles**, 200 F. Supp. 711, affirmed 315 F. 2d 186, remanded 11 L. ed. 2d 106, holding that interview notes taken by an assistant United States Attorney were producible under 18 U. S. C., Section 3500 (e) (2) if they contained "in substance what the witness said."

The basic conflict is between the narrow First Circuit interpretation in **Campbell**, *supra* (adopted in effect here by the Eighth Circuit), requiring stenographic completeness in longhand notes and the Fifth Circuit view that longhand notes recording "the highlights of the conversation" (though not word for word, but containing the substance of the information, 156 F. Supp., l. c. 853) qualify as "substantially verbatim", **Papworth**, supra. The instant record presents this conflict with the First Circuit's **Campbell** case even more sharply than does **Papworth** because here (1) the agents made notes on all the witness'

answers (R. 175); (2) the notes were sufficiently complete that the agent could make an accurate transcription (R. 175); (3) the agent attempted to take down in his notes as accurately as he could the witness' answers (R. 189). Petitioner asks that this Court rule whether or not long-hand notes taken under such circumstances are to be governed by the First Circuit's criteria in **Campbell** or the Fifth Circuit's in **Papworth**. It does little good for an appellate court to say (as here) that the question is ordinarily a question of fact to be determined by the trial court and governed by the clearly erroneous standard; the trial courts should be given sufficient guidance so that they will be able to tell whether to apply Judge Wyzanski's "substantially accurate" test in **Campbell**, 199 F. Supp. 905, 906, or Judge Bick's "the witness' own words" exclusionary rule in **Aviles**, 197 F. Supp. 536, 556. It was the latter on which the trial court relied in the instant case; this reliance is now said not shown to be clearly erroneous. Somehow it is incongruous that two such incompatible standards adopted by district courts can both be right because neither is clearly erroneous; in effect, the irreconcilable understandings of the "substantially verbatim" requirement by District Courts then become rigid, fixed, and unevenly applied as between defendants in different courts within the same or different circuits.

On reason the **Papworth** standard and definition of "substantially verbatim" is the better one; the form of the agent's recording of the witness' statement should not be exalted over its substance. The result should not depend upon adoption of the interviewed person's grammar or particular phraseology. An agent for his own purposes will ordinarily record the substance of a witness' remarks. He ought not to be accorded an open invitation to insulate his recording from production to the defense by

his testimony—ordinarily irrebuttable— that he rephrased the witn ' words or (as here) had another agent participate the interview so as to split the note-taking. Rather, where a law enforcement officer finds it adequate for his own use to record the substance of a witness' statement, such recording should likewise be deemed adequate for the use of the defense.

As an alternative ground, the Eighth Circuit held that petitioner failed to show error to be prejudicial because there was nothing in the record to indicate any likelihood that the notes would vary substantially from the smooth reports. It is somewhat paradoxical to charge the party innocent to the destruction of the notes with the responsibility of showing their variance from the smooth report, but in any event it is significant that no matter where the responsibility should lie, the instant case record (contrary to that in **Ogden v. United States**, 323 F. 2d 818) does not reflect that nothing was omitted from the statement that was present in the notes or that anything was added to the statement that was not in the notes. If the destroyed notes were "substantially verbatim" under guidelines declared by this Court, then a "court should not confidently guess what the defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." **Rosenberg v. United States**, 360 U. S. 367, 371.

In the last analysis an additional question to be resolved here is whether or not the agent's destruction for any reason of his notes concerning his interviews with Robert Williams is a non-compliance under Section 3500 (d) calling for the striking of Williams' testimony. This "important question" of the construction of subsection (d) was specifically left open by the majority in the **Campbell** case, 365 U. S., l. c. 98; it must turn upon the meaning in subsection (b) of the phrase "in the possession

of the United States", that is, whether it means in the possession of the United States at any time or means just at the precise moment in a trial when a statutory order to produce is made. It is clear that the First Circuit and the dissenters in the **Campbell** case understand it to mean the latter.

To read the statute as pertaining simply to statements "in the possession" of the Government when an order to produce is made and not pertaining to statements which **were** "in the possession" and **should now be** is to open the problem to questions of unfairness, chicanery and overzealousness. It means that if the raw interview notes help the Government they can be signed, approved and preserved under (e)-(1); if they do not aid the prosecution they can be destroyed and the helpful portions thereof incorporated in an agent's lengthy summary report. For instance, this places the burden on the witness to remember what has been omitted and to refuse to approve the agent's report some days or weeks later until these portions have been re-incorporated in the agent's report; the normal failures of human memory cannot help but overlook vital omissions so that the approved agent's report must necessarily be more favorable to the prosecution than the original interview—if an overzealous agent (whose interest in a favorable outcome cannot wholly be discounted) so desires. The Agent Myers' practice over 21 years of destroying interview notes, as comprehensive as those taken from Williams **where he attempted to take down the answers as accurately as he could** (R. 189), is an open invitation—if approved—to circumvent Section 3500.

When these issues were before this Court in **Campbell v. United States**, supra, the Court found it unnecessary to decide them. The Solicitor General in his Brief in Opposition to the Granting of the Petition for Writ of Certiorari represented to the Supreme Court, p. 15: "and

while it is not deemed administratively feasible to retain all the personal notes taken by the Agent, those notes which in themselves constitute a producible statement or a transcription thereof are retained for purposes of production under the statute." Such a statement itself furnishes the logical basis for the definition of "substantially verbatim" here urged, because it assumes a prosecutive infallibility in order to justify destruction of original interview notes of key witnesses to indictments already returned and to be returned.

5. The refusal of the trial court, upheld on appeal, to allow petitioner to call one of the three government prosecutors as a witness raises a question under the Sixth Amendment which could have a serious impact on criminal jurisprudence in the federal courts. Moreover, the holding of the Eighth Circuit on this point now provides the government with a convenient shelter to protect all of its informers against possible impeachment in any trial—all the prosecution need do is make certain that the government agent dealing with the informer is an attorney and that he becomes a member of the trial staff when the case is presented in court.

In the instant case, the "informer" was Robert Williams, a co-defendant who became the chief government witness and gave extensive testimony concerning the various facets of the alleged conspiracy. He first agreed to switch sides and become a government witness in a private conversation with Mr. James Featherstone, one of the government counsel, in an automobile in Kansas City (R. 268-271). On cross-examination, Williams denied that any specific promises or bargains were made in this conversation; he would only state that Featherstone agreed to make "recommendations" of an undefined nature (R. 273-274). The defense then sought to introduce Featherstone as a witness, for the sole purpose of ascer-

taining what, if any, specific promises, agreements, or recommendations be discussed with Williams in order to induce the latter to become a government witness (R. 1487-1497, 1715).

Both the trial court and the Eighth Circuit felt that this was a matter within the **discretion** of the trial court, and that the latter may properly prohibit the defense from calling a government attorney as a witness, apparently without regard to the impact of the anticipated testimony. In this respect, the decision below squarely conflicts with the Second Circuit holding in **United States v. Alu**, 246 F. 2d 29, which follows the philosophy of the American Bar Association's Canons of Professional Ethics, No. 19. The **Alu** case recognized the undesirability of calling a litigant's attorney as a witness, but noted that such practice would be improper **only** if such testimony "can be avoided consonant with the end of obtaining justice," 246 F. 2d at p. 33. In fact, the decision below even conflicts with the Eighth Circuit's own previous opinion in **Gajewski v. United States**, 321 F. 2d 261, 268:

> "To be sure, an accused's right to call relevant witnesses and to present a complete defense may not be abrogated for the sake of trial convenience or for the purpose of protecting a United States Attorney from possible embarrassment while testifying, if he possesses information vital to the defense. . . ."

Neither **Alu** nor **Gajewski** suggests that a trial court can, in its "discretion", preclude the testimony of a litigant's counsel if such is essential to the case. But that is exactly what was done here, for certainly the Featherstone testimony was vital and essential:

(1) Featherstone, according to the evidence, was the **only** one present when Williams agreed to become a government witness;

(2) Some sort of promise was made to Williams, the nature and extent of which he chose not to reveal. Even the Eighth Circuit conceded that "Williams' testimony with respect to the nature of the recommendations he expected is not as specific as might be desired" (Appendix, p. 59);

(3) Featherstone would be the only other person in the world to know just what promises were made to Williams;

(4) Williams was the main government witness, whose impeachment would unquestionably be a vital matter to the defense.

Yet, in view of this, the Eighth Circuit nevertheless held, that the matter was **discretionary** with the trial court and that the trial court did not abuse its discretion by prohibiting the Featherstone testimony because it might involve other matters (i. e., protection for Williams against Teamster violence) which would be prejudicial to the defense. This was indeed weak justification for the refusal, since the trial court, having been forewarned about these other prejudicial matters, could have easily instructed counsel and the attorney-witness to limit the testimony to the "recommendations" only. Therefore, the danger of Featherstone's injecting irrelevant prejudicial matter into the trial would have been summarily eliminated; and the fears of the court below on this matter are thus revealed as illusory and scarcely an excuse for failure to follow its own guidelines as established in **Gajewski**.

The importance of this issue to the uniform administration of criminal justice is at once obvious. The use of the informer is becoming more and more prevalent in criminal prosecutions, and the impeachment of such a witness is a vital element of the defense in every such case. Some clarification is, therefore, needed as to the

extent to which the defense may probe in order to learn the secret deals, promises, and agreements (if any) which were used to purchase the informer's testimony in the face of the Sixth Amendment's unconditional guarantee that a defendant shall have "compulsory process for obtaining witnesses in his favor." The Eighth Circuit has now engrafted a significant exception: government counsel may be immune from such "compulsory process," particularly when they have dealt secretly with informers and have discussed (in addition to the purchase price for the testimony) matters involving the physical protection of the informer. Perhaps, considering the complexities of modern criminology and the broad guarantees of the Fifth Amendment that no one need incriminate himself, the Eighth Circuit's rule is a salutary one which will encourage other informers to cooperate with their government in its fight against crime, but it implications call for expression by this Court. For such an exception to the Sixth Amendment would provide the government with an inviolable repository for the contents of its deals with informers, and substantially impair the opportunity of any defense counsel to expose to impeachment the testimony and motives of the informer-witness.

Let there be no doubt that the instant case is a typical one in which the informer's cooperation was obtained at a price, and is no different (and entitled to no different treatment) than the numerous other prosecutions using "purchased" testimony. The record speaks for itself: Williams admitted that "recommendations" were discussed, but denied that anything specific was suggested or promised (R. 274); Featherstone and other government counsel were vehement in their opposition to the defense request for Featherstone to testify (R. 1487-1947); Featherstone failed to provide the court with a **sworn** affidavit as to what his testimony would be, as requested by the court (R. 1495); at the ultimate sentencing, Featherstone

stepped forward and (most unusual for a government prosecutor) volunteered the specific recommendation to the trial court that Williams be given a suspended sentence (R. 2077).

Petitioner does not mean to condemn the use of informers by the government; the foregoing is pointed out merely to demonstrate that the instant case is not an unusual or extraordinary case, but is the typical situation in which the informer was promised and received something substantial for his cooperation. It is in the light of this that the record below should be examined; if the Eighth circuit decision is to stand, it will furnish a precedent and modus operandi for all cases involving an informer's testimony. The court below attempted to minimize the importance of the Featherstone testimony by noting that the informer-witness had already admitted that "recommendations" in general had been discussed. But the witness declined to remember anything further concerning his conference with Featherstone, and specifically stated that he did not know what to expect as a reward for his cooperation (R. 274). Certainly the impeachment value of the witness' admission that some undescribed "recommendations" were mentioned is far less than would be specific testimony by an officer of the court as to what recommendations were in fact promised; the defense and the jury were thus entitled to more explicit details on the matter, and should not have been compelled to rely on the vague and indefinite answers of an admitted ex-convict (R. 284), thief (R. 282) and shoplifter (R. 291). The Featherstone testimony was vital and important; the real issue, which this Court is now asked to resolve, is whether the trial court has the **discretion** under these circumstances to immunize government counsel from testifying.

Petitioner submits that this issue, i. e., the use of counsel as a witness, has been discussed many times by lower

courts, but has never been considered by this tribunal. In view of the conflicts herein suggested, the context in which it is postured in the instant case, and the increasing (and even necessary) prosecutive use of informers, a review of the issue by this Court is necessary to the uniform administration of criminal justice.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX "A".

United States Court of Appeals
for the Eighth Circuit.

No. 17,363.

Floyd Rairdon Hayes,
Appellant,

v.

United States of America,
Appellee.

No. 17,364.

Cecil H. Bennett,
Appellant,

v.

United States of America,
Appellee.

No. 17,365.

Stanley Burke Clevenger,
Appellant,

v.

United States of America,
Appellee.

Appeals from the United States District Court for the Western District of Missouri.

[March 30, 1964.]

Before Van Oosterhout, Matthes and Mehaffy, Circuit Judges.

Van Oosterhout, Circuit Judge.

Defendants Floyd Rairdon Hayes, Cecil H. Bennett and Stanley Burke Clevenger, hereinafter sometimes jointly

referred to as appellants, have taken timely appeals from their convictions and sentences upon the counts of a sixteen count indictment upon which each stands convicted. Count I of the indictment, which is the count most vigorously attacked, charges the three appellants and four co-defendants, Karl Rogers, Robert Williams, Roy Williams and Earl Dean Williams, with conspiracy under 18 U. S. C. A., § 371, to violate 29 U. S. C. A., § 501 (c). Section 501 (c) effective September 14, 1959, provides:

> "(c) Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be (punished). . . ."

It is alleged and undisputed that the seven defendants charged in the indictment are all officers or employees of Local 41 and/or Local 541 and/or Joint Council 56, all affiliated with the Brotherhood of Teamsters.

Count I charges that the seven defendants between September 14, 1959, and February 20, 1962, conspired to unlawfully abstract money and assets from the union locals just described, of which they are officers or employees. In substance, three categories of fraudulent transactions are asserted to wit: (1) Invoice padding and kickback arrangements with two business establishments, Harold's D-X Service Station and La Louisiane Restaurant; (2) fraudulent automobile repairs on nonauthorized vehicles at three garages; and (3) fraudulent home improvements and furnishings for Hayes.

Numerous overt acts in furtherance of the conspiracy are alleged.

Counts II through XVI charge substantive offenses arising out of the same type of wrongful conduct involved

in the conspiracy charge and are directed against some or all of the defendants heretofore named. All counts charge the defendants named in such counts as officers or members of labor organizations willfully and intentionally embezzled assets of such labor organizations and converted them to their own use or the use of others directly or indirectly in violation of 29 U. S. C. A., § 501 (c). We are here concerned primarily with the charges against the three appellants. Hayes is charged in Counts II, III, V, VI, VIII, IX, X,[1] XI, XIII, XIV, XV and XVI. Bennett is charged in Counts II, V, VIII, XI, XII, XIV, XV and XVI. Clevenger is charged in Counts VIII and XI.

Counts II, III and IV charge a pad and kickback arrangement with La Louisiane Restaurant. Counts V, VI and VII charge a similar arrangement with Harold's D-X. Counts VIII through XIII charge fraudulent arrangements with automobile establishments to have unauthorized personal automobile repairs charged to and paid for by the unions. Counts XIV, XV and XVI involve improvements and furnishings for Hayes' home fraudulently charged to and paid for by Local 41.

Defendant Robert Williams entered a plea of guilty to all counts on which he was charged and was an important witness for the Government at the trial. The remaining six defendants were tried to a jury. The court sustained Earl Williams' motion for acquittal upon the ground the evidence was insufficient to sustain the charges against him. Defendants Karl Rogers and Roy Williams were acquitted by the jury upon all counts.

Hayes was found guilty upon all counts upon which he was charged. He was sentenced to five years imprisonment on counts I and II to be served concurrently and fined $500 upon each of the remaining ten counts upon

[1] Count X was dismissed by the court.

which he was convicted, with imposition of imprisonment upon such counts suspended.

Bennett was found guilty on Counts I and VIII and not guilty of the other charges against him. He was sentenced to two years imprisonment on Count I; imposition of imprisonment on Count VIII was suspended but defendant was placed on probation for a two year period beginning at the expiration of the Count I sentence.

Clevenger was found guilty on Counts I, VIII, and XI, which were the only counts with which he was charged. He was sentenced to two years imprisonment on Count I. Imposition of sentence on Counts VIII and XI was suspended, defendant being placed on probation for two years commencing with the expiration of the Count I sentence.

Appellants here urge that they are entitled to a reversal for the following reasons:

I. The court erred in overruling Bennett and Clevenger's motion for acquittal on Count I upon the ground that there is a fatal variance between the indictment charging a single conspiracy and the proof showing at best a number of separate conspiracies.

II. The court erred in its instructions permitting conviction if the conspiracies were separate and distinct and in failing to delineate and define such separate conspiracies and gave the jury a roving commission to return convictions upon undefined conspiracies.

III. The court by its instruction on the substantive counts relating to automobile repairs improperly placed the burden of proof upon the defendants.

IV. The court erred in refusing to permit appellants to call and examine Special Assistant Attorney General Featherstone as a witness.

V. The court erred in failing to strike Robert Williams' testimony by reason of the Government's failure to comply with 18 U. S. C. A. § 3500.

Appellant Bennett joins in the points just stated and asserts additional grounds for reversal as follows:

VI. The court erred in overruling Bennett's motion for acquittal on Count VIII as the Government has failed to produce substantial evidence to support conviction upon such count.

VII. The court erred in ordering Bennett's counsel to refrain from commenting in closing arguments upon the failure of certain codefendants to testify thereby depriving Bennett of a fair trial.

We shall consider the errors asserted in the order in which they have just been stated.

I.

Bennett and Clevenger in their timely motions for acquittal, which were renewed after verdict, urged that there was a fatal variance in Count I in that said count charges a single overall conspiracy, whereas the proof at best shows only many separate and distinct conspiracies involving the seven defendants and some fifteen non-indicted conspirators and that under the teaching of **Kotteakos v. United States**, 328 U. S. 750, they have been prejudiced by such variance and hence the court erred in overruling their motions. The Government has consistently maintained that it has charged a single overall conspiracy and that it has proved such conspiracy.

Recently in **Isaacs v. United States**, 8 Cir., 301 F. 2d 706, we were confronted with the contention that the conspiracy to defraud the traction company was multiple rather than single. There, as here, the defendants did not receive

their payoff out of the same transactions. The various fraudulent schemes employed differed considerably and involved different primary participants, both insiders and outsiders. In **Isaacs** by reason of the instruction given to acquit if a single overall conspiracy had not been proved, it was apparent the jury found the single conspiracy. We affirmed the conviction. At pages 724 to 726 of 301 F. 2d we pointed out that the multiple conspiracy defense is not a novel one and we set out the principles to be applied in determining whether a single overall conspiracy is established, citing supporting authorities. No purpose will be served in restating such principles which are thoroughly discussed in **Isaacs**. We adhere to what we have there said.

Appellants stress their contention that the conspiracy here was of the circle type rather than of the chain type. We perceive no useful purpose in attempting to name the type of conspiracy here involved. Conspiracies to deal in contraband goods such as narcotics have sometimes been described as chain conspiracies. In such situations where all dealing with the narcotics know the transaction to be an illegal one, it is somewhat easier to infer an intention to participate in an overall illegal activity. For a discussion of the chain conspiracy situation, see **United States v. Agueci**, 2 Cir., 310 F. 2d 817, 827.

Isaacs did not involve dealing with a contraband product. Nevertheless, we found the evidence sufficient to support the finding of a general overall conspiracy in a situation where different groups performed different functions in carrying out the overall scheme to defraud the traction company.

The fundamental problem in each conspiracy case is to establish the nature and the scope of the conspiracy agreement and the connection of the defendants with the

conspiracy. In **Sigers v. United States**, 5 Cir., 321 F. 2d 843, Judge Wisdom characterizes the conspiracy there under consideration as follows:

> "In a sense, there were three conspiratorial wheels, each with its hub and spokes. But these were wheels within a wheel. The larger wheel was the conspiracy charged in Count One of the indictment." 321 F. 2d 843, 844.

In support of such statement, he quotes from **United States v. Wenzel**, 4 Cir., 311 F. 2d 164, 167, as follows:

> "It is fundamental that it is not necessary that every act undertaken in carrying out the object of a conspiracy should be participated in by every member of the conspiring group. In carrying out the purpose of a conspiracy it will be found that in practically every case different groups played different parts. To unite them in a single conspiracy it is only necessary that the activities of each individual or group be directed toward accomplishing a single criminal objective." 321 F. 2d 843, 847.

In **United States v. Speed**, D. D. C., 78 F. Supp. 366, Judge Holtzoff considered a conspiracy to embezzle from a number of unions by means of various devices. The case bears much similarity to the case we are here considering. In support of his conclusion that the jury was justified in finding a general overall conspiracy, Judge Holtzoff states:

> "The answer to the question whether there is a single conspiracy, therefore, depends on whether there is a single agreement. There may be an undertaking to commit one crime or several crimes. If there is but one agreement, there is but one conspiracy. A test whether the activities of the defendants constitute a single conspiracy is whether there is a common

purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this ends. It follows hence that the fact that the conspirators undertook to commit several crimes does not necessitate the conclusion that there are several conspiracies. A conspiracy, such as is charged in this case, may be likened to a wheel, with the hub constituting the central figure, the spokes forming its various branches and ramifications, and all being held together by the rim, which represents the agreement." 78 F. Supp. 366, 368-69.

The opinion contains a good summary of the law with respect to proof of a conspiracy and the connection of the defendants with such conspiracy.

The issue of whether a conspiracy is a single overall conspiracy is usually one of fact. **United States v. Crosby**, 2 Cir., 294 F. 2d 928, 945.

Judge Gibson, the able trial judge who heard all the evidence in ruling upon the post-trial motion for acquittal, discusses and considers **Kotteakos** and finds it to be factually distinguishable. With respect to the present case, the court states:

"They all knew each other, if not intimately, then on a day-to-day working basis. The three labor organizations were closely connected, both through extensive cooperation, and through common or interlocking officers and trusteeships. The evidence showed that the schemes to divert the union funds in all three organizations were similar, and most involved the same business establishments. Thus, the case at bar does not present the situation of the 'Wheel with spokes radiating from the hub, without the interconnecting rim,' as in the **Kotteakos** case, but a spoked

wheel with the connecting rim, if the analogy used in the **Kotteakos** case is used. Thus the Court is of the opinion that it was a permissible inference that there was a single conspiracy, which is a question of fact for the jury."

When the tests stated in **Isaacs** are applied to the facts in this case, we are convinced that the court correctly determined that a submissible case was made out for the jury on the issue of the single overall conspiracy. Such determination affords a firm basis for the denial of the motion for acquittal.

The record before us consists of over 2000 pages of testimony, a lengthy record of court proceedings and many exhibits. A detailed discussion of the voluminous evidence would unduly extend this opinion. Our examination of the record abundantly satisfies us that there is substantial evidence to support a jury finding of an overall conspiracy to embezzle a very substantial amount of union funds from the three locals by devious means and that there is likewise adequate evidence to support a finding that each of the appellants knowingly joined such conspiracy and participated in furthering its objectives. Thus it is apparent that the court committed no error in overruling the motions for judgment of acquittal.

II.

Bennett and Clevenger assert prejudicial error in the court's instruction reading:

> ". . . If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment of Count I and that not all of the defendants were members of or participated in such separate conspiracies, if you so find, then you may only consider as evidence against the members of such

conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy."

Appellants have failed to comply with our rule requiring that the exception to the instruction be set out in the brief. Appellants had requested an instruction to the effect that if the jury found more than one conspiracy they must acquit the defendants. The court refused such instruction. When the court asked for suggestions as to the instruction now attacked, Mr. Wadden, counsel for Roy Williams, stated: "For the purpose of the record, defendant Roy Williams can offer no suggestions because he feels the prejudice to him is so great that no instruction of the court can eliminate it from the case." Counsel for appellants took a similar position. In an earlier discussion relating to the instructions, Mr. Wadden did make some suggestion that the court delineate and define the conspiracies and the conspirators involved in the separate conspiracies. No specific exception was made to this instruction at the time opportunity was afforded so to do after the instructions were read to the jury. The defendants did, however, advise the court that they were preserving all exceptions previously made to the proposed instructions. While we consider it doubtful whether the exception now urged is properly preserved, we have chosen to consider it. The trial court in its post-trial memorandum explains the reason for the challenged instruction, stating:

> "Even if separate conspiracies were proven, the variance of proof from the single conspiracy count in the indictment cannot be said to have been prejudicial to the convicted defendants. The jury was instructed many times, when evidence bearing on the conspiracy count was introduced, that such evidence could be used against any particular defendant only after the jury had found that particular defendant's connection with the conspiracy alleged from other independent

evidence. Also, the jury was instructed that if it should find several distinct conspiracies then it could 'only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy.' Of course, assuming several separate conspiracies were proved the possible prejudice that might result is based on the danger that the jury will associate a particular defendant with evidence introduced to prove what was in fact a separate conspiracy with which that defendant had no connection. Under the circumstances of this case and because of the cautionary instructions given, it is difficult to conceive how this could have been prejudicial to any of the convicted defendants. Again, assuming separate conspiracies, all were so interrelated and connected with each other so that all could logically be viewed as part and parcel of the broad conspiracy charged of mulcting the unions of their funds."

The instructions as a whole meticulously defined all the elements of conspiracy and instructed the jury that the guilt of each defendant must be individually determined and that if any of the essential elements of conspiracy are not proved beyond a reasonable doubt as to a particular defendant, he should be acquitted. The court went over his proposed instructions in great detail with counsel prior to the final argument and incorporated in the instructions many of defendants' suggestions. The instructions as a whole are very fair to the appellants and the only exceptions taken to the instructions are those discussed in this opinion. Appellants in their brief with respect to the challenged instruction state:

"[W]hile it does an admirable job of keeping the acts and declaration of co-conspirators straight as between the undefined conspiracies, it sets up a situation where the jury is led to believe it can find either a single

conspiracy or separate conspiracies as long as it slots each defendant in the proper separate conspiracy."

The court's failure to give an instruction for acquittal if separate conspiracies are found is not separately asserted as an error in a brief point. However, the general tenor of appellants' brief is that under **Kotteakos** it was prejudicial error to permit a conviction if the conspiracy is not a single overall one. While we have hereinabove held that substantial evidence exists to support a single overall conspiracy and the knowing connection of each appellant therewith, there is no way of determining precisely upon this record whether or not the jury in fact found a single conspiracy. In a similar situation the Court of Appeals for the Second Circuit in **United States v. Agueci**, 310 F. 2d 817, 827, states:

> "In any event, the test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). The material inquiry is not the existence but the prejudicial effect of the variance. While we believe, as we have already stated, that the jury could find there was but one conspiracy, the finding of more than one conspiracy would not result in prejudice to any of the defendants in the case before us. See **Berger v. United States**, 295 U. S. 78, 82, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). The requirements for sustaining a verdict in which there has been a variance have been met. The several conspiracies, if there had been such, could have been joined in a single indictment or consolidated for a single trial and the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal."

In our view, any conspiracy found to exist in the present case with respect to appellants would fall within the

framework of the conspiracy charged in the indictment. Under such circumstances, it is established that proof of separate conspiracies does not constitute a fatal variance. **Berger v. United States**, 295 U. S. 78. In **Berger** a single conspiracy was charged and two conspiracies were found to exist. The court, rejecting the fatal variance contention, stated:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." 295 U. S. 78, 82.

In our present case, the two tests stated in **Berger** are fully met.

Kotteakos does not dispute the holding of **Berger** as applied to the facts in **Berger**. In **Kotteakos** the court points out that while a single conspiracy was charged, the Government admitted upon appeal that there were at least eight separate and distinct conspiracies. Thirty-two defendants were indicted. The only connection between the different groups of conspirators was that the individual fraudulent loan transactions were all carried out through the same person, Brown. No group derived any benefit from the activity of any other group. Outside of Brown, none of the defendants had any common interest in the success of any other defendant and no relationship was established between the various defendants exclusive of Brown. The court stresses at length the likelihood of prejudice to the separate defendants involved in the sepa-

rate conspiracies by the mass trial and the danger of transfer of guilt, stating:

> "Here toleration went too far. We do not think that either Congress, when it enacted § 269, or this Court, when deciding the **Berger** case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. Leeway there must be for such cases as the **Berger** situation and for others where proof may not accord with exact specifications in indictments. Otherwise, criminal conspirators never could be brought to halt. But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Section 269 had no purpose to go so far. The line must be drawn somewhere. Whether or not **Berger** marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one." 328 U. S. 750, 773-74.

The following cases, among others, have held that even if the proof could be interpreted as showing multiple conspiracies, there was no prejudicial error or fatal variance from the indictment charging one conspiracy. **Berger v. United States**, supra; **Grissette v. United States**, 5 Cir., 313 F. 2d 187, 188; **United States v. Agueci**, 2 Cir., 310 F. 2d 817, 827; **Harlow v. United States**, 5 Cir., 301 F. 2d 361, 369; **United States v. Santore**, 2 Cir., 290 F. 2d 51, 68-69;

Hanis v. United States, 8 Cir., 246 F. 2d 781, 789; **Jolley v. United States**, 5 Cir., 232 F. 2d 83, 88; **Ritter v. United States**, 10 Cir., 230 F. 2d 324, 328-29; **Owens v. United States**, 5 Cir., 221 F. 2d 351, 356; **United States v. Speed**, D. D. C., 78 F. Supp. 366, 368.

If separate conspiracies are in fact here involved, this case comes much closer to **Berger** than **Kotteakos**. The evidence clearly points to Hayes as the creator, the key figure and substantial beneficiary of all the fraudulent schemes. No prejudice is claimed or shown with respect to Hayes. Bennett as secretary-treasurer signed many of the checks on union funds. Evidence shows he had an important part in arranging for the fraudulent car repairs including some upon his own automobile. Additionally on one occasion he was given an open envelope by Harold's D-X containing charge slips and currency for delivery to Robert Williams. Because of a pending investigation, Williams refused to accept the envelope and at Williams' suggestion Bennett returned the envelope to the donor.

Clevenger's direct activity was in connection with the car repair fraud. There is evidence that in a number of instances he brought in cars which were not entitled to repairs at union expense and that he directed such charges to be made on his official car and thus have the bills paid by the union. A similar practice was followed at the garages by Hayes and Bennett and there is evidence that Clevenger had knowledge of such activities.

Here, unlike the situation in some of the cases relied upon by the appellants, the defendants charged were a closely knit group acquainted with each other. The offices of each of the unions were located in the same building. Some of the defendants were officers or employees of more than one of the locals involved.

The fact that the defendants Rogers and Roy Williams were acquitted supports the view that the jury was not confused by the court's instructions and that it determined the guilt of each defendant upon the basis of the evidence admissible against such defendant. See **United States v. Rabin**, 7 Cir., 316 F. 2d 564, 568.

The trial of multiple defendants frequently raises trial problems. Appellants have not demonstrated any prejudicial error flowing from their joint trial. In our view, the danger of confusion of of finding guilt by association in this case is far less than that existing in many other cases involving mass trials which we have affirmed. See **Butler v. United States**, 8 Cir., 317 F. 2d 249, 263; **Isaacs v. United States**, supra.

Defendants in order to be entitled to relief for prejudicial error in a mass trial must show prejudice with respect to themselves. This they have failed to do.

III.

Defendants' contention that the court's instruction with reference to the substantive counts relating to automobile repairs is prejudicially erroneous in that the instruction shifts the burden of proof upon appellants is without merit. The portion of the instruction excepted to and here challenged reads:

> "To explain it another way, if you believe that the repair was made on a car that a defendant was using in union business and that said repair was necessitated by the use of the car in union business, then you must bring back a verdict of acquittal as to said defendant on the substantive count in which he is involved on these charges, even though said defendant may have had a rental car or a car allowance on a car other than the one actually repaired."

Appellants concede that the court in the paragraph immediately preceding correctly states the law and places the burden upon the Government upon the repair counts. The apparent purpose of the challenged instruction is to direct the jury to consider appellants' contention that the disputed repairs were authorized.

The instructions as a whole clearly place the burden of proof upon the Government to establish all elements of the offense. When the challenged instruction is read in the light of the instructions as a whole, it is apparent that the jury could not have been misled by the instruction.

IV.

The trial court did not abuse its discretion in refusing to permit appellants to call Mr. Featherstone, Government counsel who was participating in the trial, as a witness. The trial court has a broad discretion with respect to examination of witnesses. Complications arise where attorneys actively participating in the trial are produced as witnesses. We recently considered this problem and set forth the applicable law and pertinent authorities in **Gajewski v. United States**, 8 Cir., 321 F. 2d 261, 268:

> "Although, as the above authorities indicate, such judicial discretion is generally exercised to prevent testimony by an advocate in **favor** of the party whom he represents, a court may, without abusing its discretion, refuse to allow the **defense** to call as a witness the United States Attorney trying the case."

In our present case, appellants did not notify the Government of their desire to use Mr. Featherstone as a witness until well along in the trial of the case.

A brief statement of the facts relating to the calling of Mr. Featherstone as a witness appears to be desirable. While testifying as a Government witness, defendant Rob-

ert Williams admitted having conversations with Mr. Featherstone with respect to the facts of this case. On cross-examination the following questions and answers appear during the examination of Mr. Williams by defendants' counsel:

"Q. Recommendations. He (Mr. Featherstone) would recommend to the judge you get leniency? Right?

A. I couldn't say what he meant to recommend. All I can say is that he used the word recommendations.

Q. What did you take this to mean?

A. I took it to mean he would tell the court that I had fully cooperated and told the story as it was, and that was it.

Q. And you expected lenieney from the court, isn't that it?

A. I couldn't tell what I expected. My expectations—I can't—"

Defendants' counsel then stated they desired to call Mr. Featherstone to establish what conversation took place between him and Mr. Williams and what promises were made and what recommendations were to be made to the court. When this first arose, the trial court suggested that Mr. Featherstone file an affidavit covering the conversation. Such affidavit was never filed. On the following day the demand for Mr. Featherstone's testimony was renewed. At that time, Mr. Featherstone stated out of the presence of the jury:

"As to the recommendations, that question has been answered. As to the other part of the conversation it would have to be concerning his personal safety, the tie-up between the local Mafia and the Teamsters and various other matters. That's the only things we discussed, his personal safety and how we would prevent the Teamsters from killing him. Now, if he wants that—"

Nothing was then said about the failure of Mr. Featherstone to file the affidavit nor was this matter pursued at any time during the trial. The Government's position is that the statement served the purpose of the suggested affidavit. The court stated:

> "I don't think at this time that Mr. Featherstone should be called on the witness stand unless it is by agreement of all of defense counsel. Now, he has stated that his testimony probably would be prejudicial to many of the defendants. Now, if they want to invite that, that's one thing. I don't want any situation with mistrial called or the grounds for mistrial."

The following colloquy appears:

> "Mr. Featherstone: And further, Your Honor, if any questions were asked of me, I am sure the answer would have to be prejudicial to these defendants and then they would be screaming for a mistrial.
>
> The Court: Well, I think they would have invited that if they put you on the stand.
>
> Mr. Broaddus [counsel for Appellant Clevenger]: Not this counsel, Your Honor."

It would appear that if Mr. Featherstone were called as a witness and pressed to give the full conversation he had with Williams, the testimony would include Williams' expression of personal danger from the defendants. Such testimony could well be highly prejudicial. Since Clevenger's counsel indicated that he would not assume the risk, we believe the court exercised its discretion properly in refusing to permit defendants to call Mr. Featherstone as a witness.

While Williams' testimony with respect to the nature of the recommendations he expected is not as specific as

might be desired, it would convey to the jury the thought that he was expecting some special consideration and there is little reason to believe in the light of Mr. Featherstone's record statement that anything Mr. Featherstone could say would be of any help to the defendant. On the contrary, serious danger existed that Mr. Featherstone, if called, might be pressed to disclose the entire conversation which included the discussion about protection.

V.

The trial court did not commit error in refusing to strike the testimony of Robert Williams under 18 U.S.C.A. § 3500 because of the Government's failure to produce FBI notes of the interview with Williams. Defendants were given the "smooth report" prepared from notes taken by the FBI agents which report was approved and signed by Williams. Such report falls within (e) (1) of § 3500. Appellants urge that they are entitled to the notes taken by the FBI agents which notes were used as an aid in preparing the smooth reports. Such claim is made under § 3500 (e) (2), which reads:

> "(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The trial court states the issue as follows:

> "The question then clearly becomes, were the handwritten notes of the interviews with Robert Williams

'statements' within the purview of § 3500, and if they were, was the government entitled, in good faith, to destroy such notes and produce only the 'smooth reports' prepared from such notes?"

It is established that FBI agents had five interviews with Williams; that no shorthand notes or electronic or mechanical recording was made of such interviews; that incomplete longhand notes were taken which were not verbatim; that smooth reports were drawn from such notes and the agents' memory; that Williams did not approve the original draft entirely; that indicated changes were made, and the smooth report was then approved and signed by Williams; that the agents in accordance with their usual practice destroyed the rough notes. The trial court found that the notes made were not of a type within the contemplation of (e) (2) and hence the Government was not required to produce such notes, which notes had previously been destroyed in good faith. Such were permissible findings of fact supported by substantial evidence.

The question of whether a statement or transaction falls within § 3500 is ordinarily a question of fact to be determined by the trial court and governed by the clearly erroneous standard. **Campbell v. United States**, 373 U. S. 487, 493; **Palermo v. United States**, 360 U. S. 343, 354-56. Appellants have failed to demonstrate that the court's foregoing findings are clearly erroneous.

Moreover, if contrary to what we have just stated, the trial court was wrong in its determination, appellants have failed to show the error to be prejudicial. The prejudicial error rules applies to § 3500. **Rosenberg v. United States**, 360 U. S. 367, 371. In our present case, defendants were furnished with the smooth report signed and approved by the witness. There is nothing in the record to indicate any likelihood that the notes would vary substan-

tially from the statement furnished. If this is not so, it would seem extremely unlikely that the notes meet the requirements of (e) (2) inasmuch as the report furnished had been approved by the witness.

VI.

Bennett challenges the sufficiency of the evidence to support his conviction on Count VIII charging fraudulent automobile repairs. Bennett was at all times subsequent to October 1959 furnished with a rented car for business purposes. Union officials were entitled to repairs, depreciation, insurance and gas on personal cars used for business purposes. There is some evidence that officials furnished rented cars still could use private cars for business and thereby be entitled to repairs at union expense. There is also evidence that generally the right to repairs and depreciation terminated when a rented car was furnished.

We agree with Bennett's contention that the burden is upon the Government to show wrongful appropriation of union funds as well as fraud. The trial court adequately answers Bennett's contention, stating:

> "Defendant Bennett concedes that there was sufficient evidence to raise an inference that the requisite intent was present on this charge, but claims that the government did not make a prima facie case that the car repaired in this count was not used in union business. It seems clear to the Court that, viewing the evidence in a light most favorable to the prosecution, enough evidence was produced to raise an inference sufficient to go to the jury that the car in question was not being used in union business. The very nature of charging the repairs to another car would suggest that the transaction was fraudulent

in this respect. When this is coupled to the fact that defendant Bennett had been furnished with a rented car for use in union business, the inference becomes stronger. It is true that the defendant did adduce testimony which tended to show that he continued to use his own personal car on union business, but this was a question of fact, which it was the primary duty of the jury to decide as to whether defendant Bennett was entitled to have his personal car repaired at union expense. The jury having obviously decided that he did not, in fact, have such a right, it does not devolve upon this Court to overturn that decision of fact."

The question of whether Bennett's use of his personal car was such under union policy as to authorize repairs chargeable to the union raises a fact issue. The jury by its verdict found against Bennett upon such issue.

VII.

Finally Bennett urges the court committed prejudicial error as to him in ordering his counsel not to comment in his argument to the jury upon the failure of co-defendants to testify. This error is predicated upon the majority opinion in **De Luna v. United States**, 5 Cir., 308 F. 2d 140, rehearing denied 324 F. 2d 375. The Government attempts to brush off this contention as frivolous, giving it only brief footnote treatment. We consider the issue raised to be substantial and troublesome.

De Luna involved a narcotics charge against De Luna and Gomez. Gomez took the stand and testified that while traveling in a car De Luna tossed a package to him and told him to throw it out of the window. Gomez further testified that he had no knowledge of the contents of the package. De Luna, as was his right, elected not to testify. In argument to the jury, counsel for Gomez emphasized

that Gomez had taken the stand and told the truth but that De Luna had not testified and had consequently not denied Gomez's version of what had happened. Gomez was acquitted. De Luna was convicted. Upon appeal, all judges agreed that prejudicial error had been committed against De Luna by permitting the reference to his failure to testify. Cases supporting such conclusion are adequately set out in the **De Luna** opinion.

Gomez, because of his acquittal, had no occasion to appeal. At the trial his counsel was permitted to comment at length upon De Luna's right to testify. The correctness of such ruling from Gomez's standpoint is not squarely raised upon the appeal but such issue necessarily enters into the discussion because of the conflicting rights of the two defendants. The majority opinion holds that Gomez's counsel had a right to comment upon De Luna's failure to testify even though the effect of such right was to create prejudicial error against De Luna. Judge Bell, concurring specially, sets out the reasons why he believes counsel for Gomez had no right to comment.

Our case is significantly distinguishable factually from **De Luna**. We do not believe that Bennett upon the basis of the record in this case has shown that any prejudice has resulted to him from the denial of the right to comment. The charges against five defendants were submitted to the jury. Bennett, Roy Williams and Rogers took the witness stand. Defendants Hayes and Clevenger did not testify. Bennett's testimony is to the effect that he committed no wrongful acts. We do not here have a situation where Bennett or any of the testifying defendants pinned any criminal acts upon non-testifying defendants. Here, unlike the situation in **De Luna**, Bennett did not place the sole blame for the wrongful acts charged upon a co-defendant. Bennett made no charges against Hayes or Clevenger with respect to any issue material to his defense.

Under such circumstances, it is difficult to perceive any benefit that might flow to Bennett by permitting him to call the attention of the jury to the fact that some of his codefendants did not testify.

A trial judge has a large responsibility in assuring a fair trial to all parties. The burden of this responsibility is greatly increased in a mass trial where conflicting rights of defendants may arise. Permitting comment upon the failure of a defendant to testify constitutes prejudicial error as to the non-testifying defendant. On the other hand, where defendant is tried separately his counsel has the right to make fair comment upon the fact that his testimony has not been denied or contradicted. The jury is entitled to consider lack of evidence as well as evidence in reaching its determination.

The problem here presented requires the weighing of the rights of the testifying and the non-testifying defendants and the preservation of the constitutional right to a fair trial guaranteed to each defendant. Upon the peculiar facts of this case, our finding of no prejudice requires an affirmance upon this issue. We limit our decision strictly to the precise facts of this particular case.

We have given careful consideration to all errors asserted by the appellants. We hold that the appellants have had a fair trial and that the court committed no prejudicial error. Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 17,364.

September Term, 1963.

Cecil H. Bennett,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Cecil H. Bennett, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

March 30, 1964.

Order entered in accordance with Opinion:

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX "B".

In the
United States District Court for the
Western District of Missouri,
Western Division.

United States of America,
Plaintiff,
vs.
No. 24,252.
Roy Lee Williams et al.,
Defendants.

Order Denying Motions of Defendants Stanley Burke Clevenger and Cecil H. Bennett for Judgment of Acquittal or in the Alternative for a New Trial, and Motion of Floyd Rairdon Hayes for New Trial.

(Filed May 1, 1963, J. C. Truman, Clerk.)

(p. 1)

This is a criminal action, in which an Indictment was returned in some Sixteen Counts against defendants. Count One charged all defendants with conspiracy to violate §501 (c), Title 29, U. S. C., in violation of §371, Title 18, U. S. C. All defendants were employees or former employees of one or the other of the following labor organizations: Over the Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union Number 41, Kansas City, Missouri, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 41"); Building Material, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union Number 451, Kansas City, Missouri, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 541"); Joint Council Number 56 of Missouri and Kansas of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (hereinafter referred to as "Joint Council 56").

(p. 2)

Before describing the substantive counts of the Indictment, certain definitions may prove useful. "Pad" as used herein means the addition of fraudulent or nonexistent charges on the monthly statements or bills of said labor organizations by the establishment named in the count, or by the owner or operator of said establishments. "Kickback" means the payment of the sums fraudulently collected from the labor organizations as a result of the "pad" to the union official named, or the payment to such person of a portion of such "pad." Of course, the result of such transactions as defined would be an embezzlement or misappropriation of the funds of the local union.

Counts Two, Three, and Four charged a pad and kickback arrangement with La Louisiane Restaurant, with Local 41, Joint Council 56, and Local 541, being the respective victims.

Counts Five, Six, and Seven charged similar arrangements regarding the accounts of Local 41, Joint Council 56, and Local 541 with Harold's D-X Service Station respectively.

Counts Eight through Thirteen, inclusive, involved a somewhat different arrangement, whereby it was alleged that the defendants had arranged to have their own personal automobiles repaired at the automobile establishment named in each count, with the repairs being charged to and paid for by the labor organization named in said

count. Counts Eight and Nine charged that this arrangement existed between Hoffman Buick Company and Local 41 and Joint Council 56 respectively. Counts Ten and Eleven charged this type arrangement with Greenlease O'Neill with the victims being Joint Council 56 and Local 41, respectively. Counts Twelve and Thirteen charged a similar practice with Paul Greenlease, Inc., the victims being Local 41 and Joint Council 56, respectively.

(p. 3)

Count Fourteen involved certain furniture which was alleged to have been used in defendant Hayes' home, and which was charged to Local 41 by Gallup Office Furniture and Appliance Co.

Counts Fifteen and Sixteen involved certain work which was allegedly performed at the homes of certain of the defendants by Mojac Missouri Company and Max Okun, and which was caused to be charged to the account of Local 41.

All defendants were charged in Count One, the conspiracy count. Defendant Karl L. Rogers was charged also in Counts Three, Four, Six, Seven, Ten, and Thirteen. Defendant Roy Lee Williams was also charged in Counts Two, Three, Five, Six, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, and Sixteen. Defendant Robert LeRoy Williams was charged in Counts Two, Three, Four, Five, Six, Seven, Eleven, and Thirteen. Defendant Earl Dean Williams was also charged in Counts Ten and Fifteen. Defendant Stanley Burk Clevenger was also charged in Counts Eight and Eleven. Defendant Cecil H. Bennett was also charged in Counts Two, Five, Eight, Eleven, Twelve, Fourteen, Fifteen and Sixteen. Defendant Floyd Fairdon Hayes was charged also in Counts Two, Three, Five, Six, Eight, Nine, Ten, Eleven, Thirteen, Fourteen, Fifteen, and Sixteen.

Defendant Robert LeRoy Williams pleaded guilty to all counts in which he was charged. All other defendants pleaded not guilty to all charges. Trial to a jury was had. At the close of the government's case, the Court sustained a motion to dismiss Count Ten, on the ground that the acts alleged therein had occurred before the passage of 501 (c), Title 29, U. S. C. The Court also sustained defendant Earl Dean Williams' motion for acquittal on the ground that the government had failed to introduce sufficient evidence to sustain the burden of proof against him, as a matter of law.

(p. 4)

The jury then returned with its verdict acquitting defendants Karl L. Rogers and Roy Lee Williams on all counts in which they were charged. Defendants Stanley Burk Clevenger and Floyd Rairdon Hayes were convicted on all counts in which they were charged, and defendant Cecil H. Bennett was convicted on Counts One and Eight, and acquitted on all others in which he was charged.

Defendant Cecil H. Bennett and defendant Stanley Burk Clevenger now move for a judgment of acquittal pursuant to Rule 29, Fed. R. Crim. P., or in the alternative, for a new trial, pursuant to Rule 33, Fed. R. Crim. P. Defendant Floyd Rairdon Hayes moves for a new trial, pursuant to Rule 33, Fed. R. Crim. P.

The first ground alleged in the motions is that there was a fatal variance from the Indictment in that while the Indictment alleged a single conspiracy, several separate conspiracies were proved. Defendants rely principally on the case of **Kotteakos v. United States**, 328 U. S. 750, in this regard. At the outset it should be stated that defendant Hayes could have in no way been prejudiced by this alleged variance, since even if there were separate conspiracies, it was clear from the evidence that he was the

central and controlling influence in each. To put it in the language used by the Supreme Court in the **Kotteakos** case, if the conspiracies were indeed separate, as to him they were not separate, as he was the "hub" of the wheel. If these conspiracies can be likened to a wheel.

In regard to defendants Bennett and Cleyenger, the Court is of the opinion that this case is distinguishable from the **Kotteakos** case. One important distinction is immediately obvious. The government does not concede here, as it did in the **Kotteakos** case, that there is a variance between the proof and the Indictment as if relates to

(p. 5)

the conspiracy charge. Indeed, in the case at bar, the government has consistently and vigorously maintained that a single conspiracy was charged and proved. The government relies principally on the cases of **Berger v. United States**, 295 U. S. 78, and **Blumenthal v. United States**, 332 U. S. 539, in regard to the multiple conspiracy problem.

There are basically two problems involved here. First, was there actually more than one conspiracy proved, and second, if so, were the defendants prejudiced by the joinder of the several conspiracies into one count? In determining the question of whether there was a single or multiple conspiracies involved, it must be noted that this is a question of fact and necessarily, of degree of knowledge, of the purpose and extent of the conspiracy and of the identities of the other persons involved. There can be little disagreement that the object of the conspiracy charged in this case was the conversion or diversion of the funds of the local unions. The government contends that the various methods in which this object was carried out were simply means of achieving this general object. The contention of the defense is that these methods were several separate conspiracies, each with the same object,

as was held in the **Kotteakos** decision. In the **Kotteakos** case the facts showed that one of the defendants, who pleaded guilty, was the hub of several fraudulent schemes, and each of the other defendants entered into the alleged conspiracy without knowledge of the existence or the identity of the other conspirators, with the exception of the "hub." It was this circumstance which rendered the proof fatally variant from the Indictment in that case. In the case at bar, the situation, though similar, is distinguishable from that in the **Kotteakos** case. Here the convicted defendants were all officers or employees of the

(p. 6)

three labor organizations involved. They all knew each other, if not intimately, then on a day-to-day working basis. The three labor organizations were closely connected, both through extensive co-operation, and through common or interlocking officers and trusteeships. The evidence showed that the schemes to divert the union funds in all three organizations were similar, and most involved the same business establishments. Thus, the case at bar does not present the situation of the "Wheel with spokes radiating from the hub, without the interconnecting rim," as in the **Kotteakos** case, but a spoked wheel with the connecting rim, if the analogy used in the **Kotteakos** case is used. Thus the Court is of the opinion that it was a permissible inference that there was a single conspiracy, which is a question of fact for the jury.

Even if separate conspiracies were proven, the variance of proof from the single conspiracy count in the indictment cannot be said to have been prejudicial to the convicted defendants. The jury was instructed many times, when evidence bearing on the conspiracy count was introduced, that such evidence could be used against any particular defendant only after the jury had found that particular defendant's connection with the conspiracy alleged from

other independent evidence. Also, the jury was instructed that if it should find several distinct conspiracies then it could "only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy." Of course, assuming several separate conspiracies were proved the possible prejudice that might result is based on the danger that the jury will associate a particular defendant with evidence introduced to prove what was in fact a sep-

(p. 7)

arate conspiracy with which that defendant had no connection. Under the circumstances of this case and because of the cautionary instructions given, it is difficult to conceive how this could have been prejudicial to any of the convicted defendants. Again, assuming separate conspiracies, all were so interrelated and connected with each other so that all could logically be viewed as part and parcel of the broad conspiracy charged of milking the unions of their funds.

The second ground asserted by defendants Clevenger, Hayes, and Bennett in support of their respective motions is that the Court erred in refusing to allow defendants to call James Featherstone, counsel for the government, to testify in regard to the possible bias, prejudice, and self-interest of the chief government witness, Robert Williams. Robert Williams, who was indicted with defendants, had pleaded guilty and testified at the trial on behalf of the government. His testimony was very damaging as to certain of the defendants. He admitted upon cross-examination that during the investigatory and later stages of the case he had a conversation with Mr. Featherstone, at which time Mr. Featherstone represented to him that he could make no promises of leniency, that the extent of punishment was up to the Court, but that if Robert

Williams co-operated with the government, Mr. Featherstone would make recommendations to the Court, but that the Court was not bound to follow any such recommendations. Robert Williams did not testify as to the nature of the recommendations which might be made. Defendants assigned as reason for calling James Featherstone their desire to bring out, in his testimony, the nature of the recommendations which he told Robert Williams he would make. The American Bar Association Canons of Professional Ethics, Canon 19 provides:

(p. 8)

> "When a lawyer is a witness for his client, except as to merely formal matters such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

Neither of the cases cited by the parties herein, either **Fisher v. United States**, 231 F. 2d 90, or **United States v. Alu**, 246 F. 2d 29, is particularly in point, but each does deal with this general problem. The **Fisher** case does seem to indicate that whether to call an attorney for one of the parties is discretionary with the Court. This, of course, means the **sound** discretion of the Court. There can be no dispute that such a request is very unusual and irregular and that it should not be allowed unless, under all the circumstances, it appears necessary to secure the rights of the defendants. In the case at bar the witness Robert Williams admitted that the government, while making no promises, had stated that they would make certain recommendations to the Court, the nature of which were unknown, but the inference was clear that the recommendations would be favorable to the interest of Robert Williams. Consequently, Robert Williams admittedly was

testifying somewhat in his own self-interest, but this does not mean that he was necessarily testifying falsely. Under the circumstances, it might have been of some interest to learn the testimony of counsel Featherstone, although his testimony presumably would have been to a large extent, cumulative to that of Robert Williams. However, the Court is of the opinion that its discretion was exercised properly in refusing to allow defendants to call counsel Featherstone as a witness. Featherstone had participated to a substantial extent in the trial, which had lasted several days to that point. The intent of the defendants was not made known to Featherstone until the day before counsel for defendants announced their in-

(p. 9)

tention to call him. Perhaps had Featherstone known of this intention sufficiently ahead of time, he could have refrained from participating in the conduct of the trial. Although the rights of the accused must be protected, the government does also have some rights during the trial of a criminal cause. In the opinion of the Court the necessity of acquiring the testimony of counsel Featherstone regarding the possible bias of the witness Robert Williams did not require the highly irregular circumstance of calling upon the counsel for the government to testify especially since the witness Robert Williams had admitted that he had a certain self-interest in his testimony, and the testimony of Featherstone would have only gone to the degree of that interest. Further, it is not possible that defendants Clevenger and Bennett could have been prejudiced by this refusal, as the testimony of Robert Williams did not tend to implicate them, but instead tended to exculpate them from the charges as to which said Robert Williams testified. Therefore, it cannot be said that they had any interest in the impeachment of the testimony of Robert Williams.

It, of course, was known by the Court that no assurances of any kind were made to witness Robert Williams or to anyone in his behalf by the Court. It was likewise known to the Court that certain assurances of protection were afforded the witness Robert Williams by the government that would in all probability have been testified to by the counsel Feathersfone if called as a witness. Such assurances and the reasons therefor would have been most damaging to all defendants; would have been most prejudicial to all defendants; and would have substantially affected the consideration of the proper issues in the trial by the jury, and finally would have made it most difficult

(p. 10)

for the jury to consider the issues of culpability and guilt of defendants in an objective manner, after receiving such highly prejudicial, yet relevant evidence relating to the witness Robert Williams' requested need for protection. Any other assurances were covered by the witness Robert Williams in his cross-examination. The Court thus is of the opinion that defendants were not prejudiced by being unable to question government counsel Featherstone on this issue but rather were relieved of possible highly prejudicial but admittedly relevant testimony relating to the issue of witness Robert Williams' interest or bias in testifying.

The third ground asserted by all convicted defendants in support of their respective motions is that the Court erred in refusing to strike the entire testimony of Robert Williams on the ground that the original notes of the interviews of Robert Williams with the agents of the Federal Bureau of Investigation were destroyed and therefore § 3500, Title 18, U. S. C., required that the testimony be struck. There is no complaint by defendants that all the reports in existence covered by § 3500 were not pro-

duced, but the crux of the allegations of defendants is that the original notes were subject to production under § 3500, and that these notes were deliberately destroyed by the F. B. I. agents, and that, therefore, the testimony to which they applied should have been struck. The smooth typewritten reports produced were prepared by the agents from the original handwritten notes, and these smooth reports were examined by the person who had been interviewed, and signed by him as being an accurate report of the interview. The question then clearly becomes, were the handwritten notes of the interviews with Robert Williams "statements" within the purview of § 3500, and if they were, was the government entitled, in good faith, to destroy such notes, and produce only the

(p. 11)

"smooth reports" prepared from such notes? This latter problem was left open in the case of **Campbell v. United States**, 361 U. S. 85 (1961), by the Supreme Court of the United States. The closest case to the case at bar appears to be a district court case, **United States v. Aviles**, 197 F. Supp. 536 (D. C. S. D. N. Y. 1961). In that case the narcotics agent had taken incomplete notes contemporaneously with his interview with the witness, from which the agent subsequently prepared a typewritten report, which the witness examined. This was the same procedure followed by the government in the instant case in regard to the witness Robert Williams. In the **Aviles** case the additional question was raised that the notes were destroyed in bad faith by the government to prevent their production to defendants. The Court in that case found that the testimony of the government agent that he destroyed the notes in bad faith was unworthy of belief, and went on to decide that such original handwritten notes were not "statements" within the meaning of § 3500, and the testimony of the witness should not be stricken for

the failure of the government to produce said notes. This Court agrees with the reasoning of the District Court for the Southern District of New York in its reasoning in the **Aviles** case that notes admittedly not a strictly verbatim transcript of the statement of the witness, from which a smooth report is later made, the smooth report being an expansion of the original notes, the expansion being made possible by association of memory of the agent with the cursory notes and abbreviations contained in the original notes of the interview, are not subject to being produced under § 3500. The Court is of the opinion that to hold otherwise would extend § 3500, the so-called "Jencks Act," far beyond the intentions of Congress in passing it, and would impose an intolerable burden upon

(p. 12)

the federal investigatory agencies in retaining all notes and memorandums, in whatever form or stage of completeness, for examination by defendants. This is not to say that in a proper case, it might not be necessary to produce such notes, but in this particular case, said notes are not subject to production, especially where the witness has examined the completed report and approved it as accurate.

All defendants convicted allege, in support of their respective motions, that this Court erred in the following portion of the charge to the jury, in that it was inconsistent and confusing with other instructions, and granted the jury a roving commission to return convictions on various undefined conspiracies, although only one conspiracy was charged:

> ". . . If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment in Count 1 and that not all of the defendants were members of or participated in such

separate conspiracies, if you so find, then you may only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy."

It is difficult to see how defendants were prejudiced by this instruction. The Court had previously defined all the elements of a conspiracy and instructed the jury that if any one of these elements were not present as to any particular defendant, then he could not be convicted of the conspiracy. Thus armed with a knowledge of the nature and elements of a conspiracy the jury cannot be said to be ignorant of the effect of the evidence as applied to the conspiracy count. The question of a single or multiple conspiracies, as stated previously, is primarily a question of fact. The jury, knowing the elements of a conspiracy, is capable of determining whether there were one or several conspiracies. The instruction complained

(p. 13)

of, was merely a cautionary one in which the jury was warned as to what evidence it might use in determining the fact issues reserved for its determination, and in which the jury was cautioned not to allow the evidence admitted against one defendant to be used against another, to whom it did not apply. This was exactly the prejudice which resulted in fatal error in **Kotteakos v. United States** (supra), and in the opinion of the Court, the above instruction served to eliminate such prejudice in this case, if any did indeed exist, and could not have been considered prejudicial to defendants. Again, regarding defendant Hayes, as he was clearly implicated in all phases of the conspiracies or conspiracy, it was a single conspiracy as to him, and he could have in no way been prejudiced. As to the other convicted defendants, Clevenger and Bennett, their conviction on the substantive counts is indicative of their participation in the conspiracy.

As their fifth assignment of error in support of their respective motions, all defendants claim that the Court erred in giving the following instructions to the jury, in regard to the Counts involving automobile repairs:

> "... if you believe that the repair was made on a car that a defendant was using in union business, and that said repair was necessitated by the use of the car in union business, then you must bring back a verdict of acquittal as to said defendant on the substantive count in which he is involved on these charges, even though said defendant may have had a rental car or a car allowance on a car other than the one actually repaired."

The contention of the defendants is that this charge improperly shifted the burden of proving that the repairs were necessitated by use of the car in union business to defendants. Taken out of context as this portion of the charge is, it may appear that the burden of proof was shifted, but when the whole of the charge relating to these

counts is considered, it is clear that no such shifting occurred and that it was made clear to the jury where the burden of proof lay, and that this portion of the charge merely stated defendants' theory as to the use of cars conversely from the manner in which it had been just previously stated, and that considering the whole of the charge, it was clear that the burden of proof was not shifted.

Defendant Bennett, in support of his motion, alleges, as a sixth assignment of error on the part of this Court, the failure of this Court to allow counsel for defendant Bennett to comment on the failure of defendants Hayes and Clevenger to testify on their own behalf. At a conference in chambers preceding final argument in this

case, counsel for defendant Bennett expressed his intention to comment upon the failure of defendants Hayes and Clevenger to testify and to draw inferences therefrom favorable to his client and unfavorable to defendants Clevenger and Hayes, and stated that he relied upon the case of **DeLuna v. United States**, 308 F. 2d 140 (5th Cir. 1962). The Court specifically then ordered counsel for defendant Bennett to refrain from commenting on Hayes' and Clevenger's failure to testify. The Court was aware of the decision in the **DeLuna** case prior to ruling upon this matter, and both views are set forth in the majority and dissenting opinions in that case very ably, and this Court will not proceed to discuss this problem in detail here. Suffice it to say that this Court does not consider itself bound to follow the majority opinion in the **DeLuna** case; that it does not consider the majority opinion in that case to be a correct statement of the law as it is or as it should be, and that the Court does agree with the dissenting opinion in the **DeLuna** case, which, it is believed, correctly states the law. To hold otherwise gives defendants similarly situated the right to demand as a matter of law, a mandatory severance.

(p. 15)

Defendant Bennett also asserts, as a seventh ground in support of his motion, that the evidence of the government in regard to Count Eight of the Indictment, failed to establish a prima facie case. Defendant Bennett concedes that there was sufficient evidence to raise an inference that the requisite intent was present on this charge, but claims that the government did not make a prima facie case that the car repaired in this count was not used in union business. It seems clear to the Court that, viewing the evidence in a light most favorable to the prosecution, enough evidence was produced to raise an inference sufficient to go to the jury that the car in question was not being used in union

business. The very nature of charging the repairs to another car would suggest that the transaction was fraudulent in this respect. When this is coupled to the fact that defendant Bennett had been furnished with a rented car for use in union business, the inference becomes stronger. It is true that the defendant did adduce testimony which tended to show that he continued to use his own personal car on union business, but this was a question of fact, which it was the primary duty of the jury to decide as to whether defendant Bennett was entitled to have his personal car repaired at union expense. The jury having obviously decided that he did not, in fact, have such a right, it does not devolve upon this Court to overturn that decision of fact.

For the reasons above stated the motions of defendants Bennett and Clevenger for a judgment of acquittal or, in the alternative, for a new trial, and the motion of defendant Hayes for a new trial, respectively, are denied.

It Is So Ordered.

Floyd R. Gibson,
Judge.

Kansas City, Missouri,
May 1, 1963.

APPENDIX "C".

Text of the Jencks Act, 18 U. S. C., § 3500:

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pur-

suant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

§ 501. Fiduciary responsibility of officers of labor organizations—Duties of officers; exculpatory provisions and resolutions void.

(c) Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

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No. 1043

In the Supreme Court of the United States

October Term, 19[illegible]

CECIL H. BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Vol. 15, 1–26; Pet. App. 41–65) is not yet reported.[1] The opinion

[1] The record consists of 15 volumes. Volumes 7 through 14 contain the reporter's transcript of the trial and are referred to as "Tr." Volumes 1 through 6, which are consecutively paginated, contain various documents and papers filed in the district court and are referred to by appropriate volume number. Volume 15, which is separately paginated, contains the proceedings in the court of appeals and is referred to by volume number. References to the government exhibits introduced into evidence at the trial, which are lodged with the Clerk of this Court, are "G. Ex."

of the district court denying motions for a new trial (Vol. 6, 963–977; Pet. App. 67–82) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1964 (Vol. 15, 1; Pet. App. 41, 66). The petition for a writ of certiorari was filed on April 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence showed separate conspiracies.

2. Whether it was proper to instruct the jury that if it determined that there had been separate conspiracies it should consider conspirators' acts and declarations only against defendants who were members of the same particular conspiracy.

3. Whether the failure to produce an F.B.I. agent's handwritten interview notes, which were destroyed in good faith after the reports prepared from the notes had been approved by the witness, violated 18 U.S.C. 3500.

4. Whether the trial court properly refused to permit the defense to call as a witness one of the prosecutors trying the case.

5. Whether the trial court properly refused to allow petitioner's counsel to comment in closing argument about the failure of two co-defendants to take the witness stand.

STATUTE INVOLVED

Section 501 of the Landrum-Griffith Act of 1959, 73 Stat. 535, 29 U.S.C. 501(c), provides:

> Any person who embezzles, steals, or unlawfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT

A 16-count indictment returned in the United States District Court for the Western District of Missouri charged petitioner and six co-defendants, as officers and employees of three labor organizations affiliated with the International Brotherhood of Teamsters, with conspiring, from September 1959 to February 1962, to embezzle substantial amounts of money and assets of the organizations, and with embezzlement pursuant to the conspiracy, in violation of 18 U.S.C. 371 and 29 U.S.C. 501(c) (Vol. 1, 1–22). Co-defendant Robert Williams pleaded guilty to the counts in which he was charged and testified for the government (Tr. 59, 274). After a jury trial, petitioner was found guilty of conspiracy and one substantive violation (Tr. 2072–2073; Vol. 5, 758).[2] Petitioner was sentenced to

[2] Co-defendants Floyd Hayes and Stanley Clevenger were convicted of conspiracy and two or more substantive counts (Tr. 2070, 2071; Vol. 4, 756–757, 760; Vol. 6, 978, 981). Co-defendants Roy Williams, Earl Dean Williams and Karl Rogers were acquitted on all counts in which they were charged (Tr. 2069, 2071, 2073; Vol. 4, 754–755, 759, 761).

imprisonment for two years on the conspiracy count to be followed by probation for two years on the substantive count (Vol. 6, 980). The court of appeals affirmed the convictions (Pet. App. 41–65).[3]

The pertinent facts may be summarized as follows:

1. Locals 41 and 541 and Joint Council 56 were labor organizations affiliated with the International Brotherhood of Teamsters and maintained offices in the same building in Kansas City, Missouri (Tr. 59–62, 64, 317–318; Vol. 4, 642). The indicted defendants were all officers or employees of those unions. Hayes was the Secretary-Treasurer of Local 41 and Joint Council 56 until he was imprisoned on an income-tax-evasion conviction in August 1959 (Tr. 62–63, 65, 67; see Tr. 199–200, 204, 982, 987). During Hayes' imprisonment, petitioner was the acting Secretary-Treasurer of Local 41, and he continued to hold the office after Hayes' release in the latter part of 1960 (Tr. 62–63, 65, 67, 69, 243). As Secretary-Treasurer, petitioner co-signed all checks releasing funds of the Local (Tr. 1266–1267).

a. In 1954, the three labor organizations opened charge accounts at the La Louisiane Restaurant in Kansas City, Missouri, for the use of their officers and agents (Tr. 71–73, 74, 255–257, 343–346). Thereafter, Hayes proposed to the restaurant's proprietor that the monthly invoices of each organization be "padded" by $240, of which the proprietor would retain $40 while making a "kickback" of $200 to Hayes (Tr. 348–349). This practice was then instituted (Tr.

[3] Co-defendants Hayes and Clevenger have not petitioned for certiorari.

352–355, 365–366, 394–395, 407–408, 415–416. In July 1957, Hayes instructed the restaurant owner to "increase the pad" on each of the three accounts to $300 per month, with $250 going to Hayes and $50 to the proprietor on each account. This, too, was done (Tr. 353–354, 360–361, 368–382, 396–405, 410–415).

Hayes made similar arrangements for increased bills at a particular D–X gasoline station (later called Harold's D–X Service Station) in Kansas City (Tr. 504–513, 538–540). The monthly "pads" on the three accounts totaled $650 plus 10% of the actual union expenses (Tr. 92–93, 101, 538–540, 550–551). In addition, the personal automobile expenses incurred by Roy Williams (President of Local 41 and Joint Council 56) and his wife were added to the union's account, and 50% of the profit made on the sale of new tires to the union at retail, instead of fleet, prices was "kicked back" to Hayes (Tr. 92–94, 310–311, 540–541, 551).* Hayes was collecting each of these monthly kickbacks until his imprisonment (Tr. 103, 354–355, 368–382, 396–405, 410–415, 482, 511–513, 523–524, 541, 542; see Tr. 562–566, 582, 588).

In August 1959, Hayes instructed Robert Williams to collect the payoffs from La Louisiane and Harold's D–X, to keep $150 a month as his compensation for these "extra duties", and to divide the balance among Hayes' wife, Rogers (President of Local 541) and

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*At first, Roy Williams' personal account was simply added to the total amount of the invoices, which the labor organizations paid (Tr. 94). Later, Roy paid his personal account, but that amount was added to the monthly statements to the labor organizations and Roy was "reimbursed" via kickbacks for such amounts (Tr. 93–94, 277).

Roy Williams (Tr. 75–80, 82–84, 90–92, 222–223, 248). Robert Williams did so until the arrangements were terminated in 1960 and 1961 (Tr. 89, 91–109, 207–209, 212–219, 277, 356, 362, 542, 550, 582, 588, 597).

After Hayes' imprisonment (in August 1959), petitioner, who was acting Secretary-Treasurer, co-signed the Local 41 checks which, together with checks from Local 541 and Joint Council 56, were used to pay the padded invoices (Tr. 368, 372–383, 397–405, 410–415; G. Exs. "A", "B" and "C" Series). In early fall of 1961, after the F.B.I. had begun an investigation of the case—a matter which was common knowledge at the union building (Tr. 230, 247)—the proprietor of Harold's D–X gave petitioner the final kickback on the accounts of Local 41 and Joint Council 56, with instructions to give the envelope to Robert Williams (Tr. 138–139, 546, 580, 582, 583, 588–590). Petitioner tried to deliver the envelope in a men's room at the union building, but Robert refused it and told petitioner to return the envelope "because the government agents very probably have taken pictures of you accepting it" (Tr. 138–140, 229–231, 546, 588–590).

b. During the relevant periods, Local 41 and Joint Council 56 paid repair expenses on personal automobiles of union officials used for union business (Tr. 143–145, 1570), and provided allowances for depreciation and insurance premiums on such automobiles (Tr. 678, 726, 727, 763–764, 769–771, 1569–1570). No depreciation or repair allowances were authorized

for rented automobiles or personal cars not used on union business (Tr. 155, 1569–1570; see Tr. 719).

In 1957 or 1958, Hayes made arrangement with the personnel at the Hoffman-Buick and Greenlease-O'Neill Oldsmobile firms of Kansas City whereby repair orders on unauthorized automobiles would be charged on the unions' invoices as if the repairs had been done on authorized automobiles (Tr. 610–613, 812–814; see Tr. 71–72, 74, 143–144, 145–147, 615–630, 696–698). Petitioner ordered such repairs on unauthorized vehicles at Hoffman-Buick more than ten times prior to 1959 (Tr. 612, 614–616), and had the repairs charged to authorized vehicles.

From October 9, 1959, petitioner was furnished with a leased automobile by Local 41 (Tr. 240, 673, 675, 728, 759–761; see Tr. 155, 1570), and the union ceased paying petitioner a $90 per month depreciation allowance on his personal 1957 Lincoln automobile (Tr. 1569–1570). Between December 1959 and September 1960, petitioner had his personal Lincoln serviced and repaired on seven occasions at Hoffman-Buick, and instructed Hoffman personnel to charge the repairs to the 1957 Oldsmobile of one Kappelman, the Vice-President of Local 41 (Tr. 612, 615–630, 696–698, G. Exs. G. 1–2, 6–7, 16–17, 21–22, 24–25, 29–30, 32–33). On at least one occasion, petitioner affixed the signature of "L. Kappelman" to the repair order (Tr. 1578). The invoices reflecting the repairs of petitioner and others were sent to and paid by Local 41 and Joint Council 56, the checks of Local 41 being signed by petitioner and Roy Williams (Tr. 734–736,

811–812, 861–866; G. Exs. "G", "H", "I", and "J" Series.)

e. In 1959, a builder who constructed a porch on Hayes' home, was paid with a Local 41 check for $2,375 signed by Hayes and Roy Williams (Tr. 945–948; G. Ex. N–1). While Hayes was in the penitentiary, about $2,000 worth of improvements, ordered by Mrs. Hayes, were performed (Tr. 949–950, 959–960, 1010–1011, 1013–1015, 1016–1017, 1018–1020, 1023–1024, 1025–1026). The builder thereafter was paid for these improvements by a check from Local 41 signed by petitioner and Roy Williams, which covered the improvements as well as payment for some work performed at the union building (Tr. 956, 959–960, 988, 998, 1002–1003; G. Ex. N–2). About $6,000 worth of additional improvements on the Hayes home were included in a bill send to Local 41 in April 1961, which also covered a major improvement job at the union building (Tr. 962–973). The bill was paid by Local 41 checks signed by petitioner and Roy Williams (Tr. 1006; G. Ex. O 1–3, 5, 7 and 8).

In February 1961, furniture bought by Hayes for his home was billed to Local 41 along with the union's purchases and paid for by check signed by petitioner and Roy Williams in the total amount of $1,049.20; $464.46 was in payment of the Hayes' furniture (Tr. 892–899, 906–908, 910; G. Ex. M 1–6; see Tr. 918–919, 923, 925–926; Vol. 1, 45).

2. In its instructions to the jury, the court charged that to convict a defendant of conspiracy the jury must believe beyond a reasonable doubt that a conspiracy existed, that the defendant knew of the

conspiracy, and that "there also existed on the part of each defendant a voluntary and intentional association by him in the understanding and object of the conspiracy" (Tr. 2028–2034). The court said that the "participation of any single individual [could] be determined only by the evidence as it relates to him"; that once the jury found a conspiracy to exist and that a particular defendant was a member of it, the acts and declarations of co-conspirators in furtherance of the conspiracy could be considered against him; and that "the acts and declarations of each conspirator considered individually may be evidence of his own connection with the conspiracy, and the conspiracy may be proved by the sum and total of the acts and declarations of all participants" (Tr. 2028–2036). The court then charged (Tr. 2036):

> * * * If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment in Count 1 and that not all of the defendants were members of or participated in such separate conspiracies, if you so find, then you may only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy.

ARGUMENT

All of petitioner's contentions were fully considered and correctly rejected by the district court (which stated its reasons in an opinion) and by the court of appeals. There is no real conflict among

circuits on any of the questions presented by this case, and no issue calling for this Court's consideration is involved.

1. Petitioner's claim (Pet. 18–24) that the evidence established the existence of three separate conspiracies rather than a single overall venture, and that he was prejudiced by this variance under the rule of *Kotteakos* v. *United States*, 328 U.S. 750, is without merit. First, the evidence showed that the conspirators named as defendants in the indictment were, in fact, engaged in "a larger general scheme" or "single, over-all, comprehensive plan" (*Blumenthal* v. *United States*, 332 U.S. 539, 558) to divert union funds for the benefit of Hayes and his friends. This case does not involve, as did *Kotteakos*, the "fringe" participants in a conspiracy who were linked to other conspirators only through a common "hub." Consequently, the conspiracy may be defined in terms of the single purpose of its principal members. This conclusion is not affected by the fact that the conspirators may have operated at different levels of authority, or by the fact that not all conspirators had equal stakes in the venture. Nor need all the participants in a single conspiracy know of all the conspiratorial activities of their cohorts. *United States* v. *Kissel*, 218 U.S. 601, 607; *Isaacs* v. *United States*, 301 F. 2d 706, 727–728 (C.A. 8), certiorari denied, 371 U.S. 818; *United States* v. *Crosby*, 294 F. 2d 928, 945 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984. Moreover, since petitioner was implicated in each of the three allegedly separate conspiracies by reason of his having signed the Local 41 checks which were used

to make the various payments, he could not have been prejudiced even had the evidence disclosed multiple conspiracies. See *Monroe* v. *United States*, 234 F. 2d 49 (C.A.D.C.), certiorari denied, 352 U.S. 873; *Ritter* v. *United States*, 230 F. 2d 324, 329 (C.A. 10); *Canella* v. *United States*, 157 F. 2d 470 (C.A. 9). And the jury's verdict, under which petitioner was found guilty only of the substantive offense involving some benefit to himself—*i.e.*, the use of union funds to pay for personal auto service and repairs—cannot be taken as affirmative proof that the jury found petitioner blameless with regard to the other ventures.

2. Petitioner's contention (Pet. 24–26) that the trial court's instruction regarding separate conspiracies (*supra*, p. 9) permitted the jury to convict for offenses not charged in the indictment is also insubstantial. The evidence disclosed that some co-conspirators might be involved only in limited portion of the overall scheme. The judge therefore properly protected the rights of all parties and prevented any impermissible carryover of evidence. The discrimination exercised by the jury, which acquitted two defendants,[5] indicates that it followed the court's instructions.[6]

3. At the trial, the government turned over to the defense a total of 20 reports covering information

[5] Co-defendant Karl Dean Williams was granted a directed verdict of acquittal.

[6] There is no foundation to petitioner's claim (Pet. 24–25) that the decision below conflicts with *Brooks* v. *United States*, 164 F. 2d 142 (C.A. 5), where the court, finding that the proof showed separate and distinct conspiracies, reversed the case because of an instruction that the acts and declarations of each would be admissible against the others. The trial court's instructions here avoided the error found in *Brooks*.

which Robert Williams had given to various agents of the F.B.I. on the subjects testified to at the trial (Tr. 53–56). F.B.I. Agent Myers testified that he interviewed Robert Williams on five occasions; that he and another agent asked questions and took longhand notes of the answers; that his notes were fragmentary; that some of the notes covered "other matters"; and that, shortly after the interviews, he dictated his reports from the notes as supplemented by his memory (Tr. 174–176, 188–189). The handwritten notes were not shown to Williams, but after the "smooth reports" were prepared they were submitted to Williams who made a few changes and then approved them (Tr. 181). After the reports had been prepared, Agent Myers destroyed his handwritten notes in accordance with his custom during his 21-year tenure with the F.B.I. (Tr. 178).

As shown by the record, the interview notes were not producible "statements" within the ambit of 18 U.S.C. 3500(e). They were not shown to Williams, nor did he sign, adopt or otherwise approve of them. The notes were not a substantially verbatim recital of what Williams had told Agent Meyers. They were fragmentary jottings which Meyers used, along with his memory, to prepare the "smooth" reports. The final reports were approved by Williams, and these were furnished to the defense at the trial. After the notes had served their purpose, they were destroyed in good faith by Agent Meyers in accordance with his custom and practice. Under these circumstances, petitioner was clearly not entitled to production of the

notes, much less to the striking of Williams' testimony. *Killian* v. *United States*, 368 U.S. 231, 242.[7]

4. Robert Williams testified on cross-examination that he had a conference with Mr. James Featherstone, one of the government attorneys, in which Williams stated his intention to cooperate with the government (Tr. 270–271). Williams testified that Featherstone had told him that the government "couldn't make any promises" for his cooperation and that it could only "make recommendations" to the court (Tr. 219–220, 273–274). The following then transpired (Tr. 274):

> Q. [By Mr. Wadden, counsel for one of the acquitted defendants]. Recommendations. He would recommend to the judge you get leniency? Right?
>
> A. I couldn't say what he meant to recommend. All I can say is that he used the word recommendation.
>
> Q. What did you take this to mean?
>
> A. I took it to mean he would tell the court that I had fully cooperated and told the story as it was, and that was it.

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[7] *Papworth* v. *United States*, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854, upon which petitioner relies, is inapposite. There, as disclosed in the opinion of the district court (156 F. Supp. 842, 853), the agent testified that his notes contained the substance of the information given by the witness. In addition, the notebook of the agent was delivered to the trial court in *Papworth* for *in camera* inspection along with the final report. The court observed that the notes had been typewritten exactly as they appeared in the notebook. Under these circumstances, the trial court decided that both the notes and the typed report were subject to production under 18 U.S.C. 3500(e)(2).

Later in the trial, counsel sought to call Featherstone as a witness. At a bench conference, counsel said that his purpose was to establish the conversation, "to know whether there was any inducement, whether there was any encouragement, whether there were any promises made to him * * *" (Tr. 1487, 1489). He said that he wanted to know "what [Featherstone's] recommendation were going to be" (Tr. 1492). The following colloquy transpired (Tr. 1493–1495):

> Mr. FEATHERSTONE. And further, Your Honor, if any questions were asked of me, I am sure the answer would have to be prejudicial to these defendants and then they would be screaming for a mistrial.
>
> The COURT. Well, I think they would have invited that if they put you on the stand.
>
> Mr. BROADDUS [counsel for co-defendant Clevenger]. Not this counsel, Your Honor.
>
> * * * * * *
>
> Mr. FEATHERSTONE. As to the recommendations, that question has been answered. As to the other part of the conversation, it would have to be concerning his personal safety, the tie-up between the local Mafia and the Teamsters, and various other matters. That is the only other things we discussed, his personal safety and how we would prevent the Teamsters from killing him. Now, if he wants that——

The court then said that before ruling it wished to have a sworn statement from Featherstone indicating "what the evidence [would] be and whether or not it would be essential to the presentation of [the]

defense" (Tr. 1495). On the following day—before an affidavit was filed—counsel renewed his application to call Featherstone as a witness. Without any reference by the court or either party to the absence of the affidavit, the motion was overruled (Tr. 1715).

This ruling was a proper exercise of discretion by the trial court. See *Fisher* v. *United States*, 231 F. 2d 99, 104 (C.A. 9); *Gajewski* v. *United States*, 321 F. 2d 261, 268 (C.A. 8); *United States* v. *Alu*, 246 F. 2d 29, 33 (C.A. 2). Not only was there a substantial likelihood that other defendants would have been prejudiced if Featherstone had been called as a witness and asked for the full conversation he had had with Williams (*i.e.*, including statements concerning Williams' personal safety and steps the government would take to "prevent the Teamsters from killing him")—a risk which co-defendant Clevenger expressly refused to assume—but, as the court of appeals correctly noted (Pet. App. 60), Williams' testimony conveyed "the thought that he was expecting some special consideration and there [was] little reason to believe in the light of Mr. Featherstone's record statement that anything Mr. Featherstone could say would be of any help to the defendant."[*]

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[*] Petitioner's claim (Pet. 35–36) that the decision below conflicts with the *Alu* and *Gajewski* cases, *supra*, is without foundation. In *Gajewski*, the court pointed out that the district court "*may, without abusing its discretion*, refuse to allow the defense to call as a witness the United States Attorney trying the case." *Id.* at 268. (Emphasis added.) In *Alu*, the Assistant United States Attorney who conducted a particular grand jury proceeding was called as a witness by the

5. Finally, there is no merit to petitioner's contention (Pet. 26–29) that the trial court erred in refusing to allow his counsel during closing argument to comment upon the failure of co-defendants to testify. While petitioner undoubtedly had the right to emphasize to the jury that *he* had taken the witness stand and testified, it would prejudice his co-defendants if he commented on their failure to take the stand. See *Stewart* v. *United States*, 366 U.S. 1, 5–10; *Wilson* v. *United States*, 149 U.S. 60, 65.

De Luna v. *United States*, 308 F. 2d 140 (C.A. 5), rehearing denied, 324 F. 2d 375, is clearly distinguishable. In that case, it was held that a defendant has the right to comment on the failure of a co-defendant to take the stand when the first defendant's defense is that the co-defendant alone is the culpable party. Here, petitioner did not assert that the non-testifying defendants (Hayes and Clevenger) where the really blameworthy parties. He testified only that he committed no wrongful act (*e.g.*, Tr. 1547, 1550–1554). As the court of appeals said (Pet. App. 65), "Under such circumstances, it is difficult to perceive any benefit that might flow to Bennett by permitting him to call the attention of the jury to the fact that some

---

prosecutor and testified as to matters before the grand jury. While the court held that the trial court did not err in allowing this testimony, it nevertheless criticized the "dubious propriety" on the part of the government in calling the witness and relying on his testimony. The court noted that "lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with the end of obtaining justice." *Id.* at 33, 34.

of his co-defendants did not testify." Consequently, the district court was fully justified in preserving the rights of the co-defendants.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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